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No. 07-916

IN THE

Supreme Court of the United States

ROBERT BRACE,

Petitioner

v.

THE UNITED STATES,

Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals for the
Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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BRIEF INTRODUCTORY STATEMENT

On June 25, 1996, after losing an enforcement action brought by the Government and exhausting all avenues of appeal, Robert Brace acquiesced to the Government's demands to "restore" his property entered into a Consent Order. The terms of that Consent Order required that Brace, among other acts, place fill and structures on his property for the purpose of "restoring" that property to the condition that existed in 1984 – a point in time when Brace's property was dry. After complying with the Consent Order, Brace's previously dry property began to flood to the point where, at the time of trial, a large pond was consistently present.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in concluding that the Consent Order to which Robert Brace acquiesced could not, regardless of its effect on Brace's property, cause a Fifth Amendment taking.

2. Whether the Court of Appeals erred in concluding that the Government's forced placement of a check dam and fill on Brace's property did not constitute a physical taking.

3. Whether the Court of Appeals erred in concluding that two legally and factually distinct parcels constituted the relevant parcel for the regulatory takings analysis when, during earlier enforcement proceedings, the Government successfully argued that Brace was not entitled to consider both parcels in applying the exceptions to the Clean Water Act.

LIST OF PARTIES

Petitioner:

Robert Brace

Respondent:

United States of America

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Opinion and Order of the United States Court of Federal Claims:

Brace v. United States, 72 Fed. Cl. 337 (2006).

Opinion and Order of the United States Court of Appeals for the Federal Circuit:

Brace v. United States, 2007 WL 2947319 (C.A.Fed.)

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over the decision of the October 10, 2007 Order of the United States Court of Appeals for the Federal Circuit (the "Court of Appeals") pursuant to 28 U.S.C . § 1254(1). The Court of Appeals had jurisdiction over the August 4, 2006 final order of the United States Court of Federal Claims (the "Trial Court") pursuant to 28 U.S.C. § 1295.. The Trial Court had jurisdiction over this takings claim pursuant to 28 U.S.C. § 1491.

CONSTITUTIONAL PROVISIONS INVOLVED

"[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

CONCISE STATEMENT OF THE CASE

Robert Brace ("Brace") commenced this action in 1998 after a previous legal dispute between Brace and the United States of America (the "United States"), acting through the Environmental Protection Agency ("EPA"). The action concluded with the entry of a consent decree mandating the placement of certain materials and structures on a 58-acre farm Brace had purchased in 1975 (the "Murphy Farm").

Brace's Purchase and Use of the Murphy Farm

Prior to the 1940s, the Murphy Farm was owned by individuals unrelated to Brace's family. (Fed. Cir. App. 150[1]). During the 1940s, Brace's father purchased the farm and began using it as pastureland for his dairy cattle. (Fed. Cir. App. 153). The Brace family had been farmers in Erie County, Pennsylvania since at least the 1930s. (Fed. Cir. App. 23). Prior to his purchase of the Murphy Farm, Brace's father had owned what is referred to as the Homestead Farm. (Fed. Cir. App. 149, 152). The Homestead Farm is the farm on which Brace was raised and was used by Brace's father for crop farming. (Fed. Cir. App. 153). Brace's father owned this farm at all relevant times, both before and after his purchase of the Murphy Farm, except for a brief period during the Great Depression. (Fed. Cir. App. 149, 152). The Homestead and Murphy Farms are

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[1] "Fed. Cir. App." refers to Brace's appendix submitted to the Court of Appeals for the Federal Circuit. Brace is citing to and relying on this Appendix pursuant to Sup. Ct. R. 12(7).

legally distinct parcels, separated by a township road, that have been used by both Brace and his father for distinct farming purposes.

In 1975, Brace's parents concluded that they could no longer operate their dairy farming operation on the Murphy Farm in a sufficiently profitable manner. (Fed. Cir App. 153). As a result, they decided to sell both the Homestead and Murphy Farms. (Fed. Cir. App. 150, 153). Brace did not want the Homestead Farm to be sold outside his family. (Fed. Cir. App. 153). While dairy farming on the Murphy Farm and crop farming on the Homestead Farm was not profitable, Brace believed he could make the Murphy Farm profitable if he used it for row crops. (Fed. Cir. App. 159). With these as his personal and business goals, Brace purchased the Murphy and Homestead Farms from his parents for a total price of $170,000. (Fed. Cir. App. 150, 153, 176-177). This was the value at which Brace's parents had the two farms appraised. (Fed. Cir. App. 153-154).

Brace's Operation of the Murphy Farm and the Government's Assistance in Constructing Necessary Drainage on the Farm.

Shortly after purchasing the Murphy Farm, Brace began the process of converting the farm from pastureland to land appropriate for growing row crops. (Fed. Cir. App. 159). Like almost every other farmer in Erie County, Brace had to construct a drainage system on the Murphy Farm in order to use it for row crop farming. (Fed. Cir. App. 101). At the time Brace purchased the farm, he was aware that a more substantial drainage system would be required

to make the farm productive. (Fed. Cir. App. 157-160).

Brace was also aware that his father had begun the process of utilizing government assistance in constructing a drainage system on the Murphy Farm. (Fed. Cir. App. 23, 798-820). In or around 1961, the Agricultural Stabilization and Conservation Service ("ASCS") and the Soil Conservation Service ("SCS"), both agencies within the United States Department of Agriculture, developed a drainage plan that involved the placement of underground drainage tile on the Murphy Farm and surrounding land. (Fed. Cir. App. 105-107, 787-797). Brace's father had begun implementing this plan, and Brace continued it after purchasing the Murphy Farm. (Id.; Fed. Cir. App. 23) Working with his local ASCS office and the SCS, Brace continued the construction of the drainage system developed by the ASCS and SCS in order to convert the Murphy Farm into an "effective and productive farming business." (Fed. Cir. App. 23). Between 1977 and 1984, Brace engaged in four separate projects to provide drainage to the Murphy Farm. (Fed. Cir. App. 787-820; 106-109, 119-124, 163-164). Each of these projects was either initiated by or done in coordination with the ASCS and SCS. (Id.) All tolled, Brace laid over 11,000 feet of pipe, tile and waterways. (Id.)

Murphy Farm's Condition by 1979

By 1979, Brace's work on the drainage system resulted in the Murphy Farm being dry, except for times of excessive rainfall. (Fed. Cir. App. 23-24). By 1986, Brace's drainage work was complete and he

began growing crops on the Murphy Farm. (Fed. Cir. App. 24). The drainage system that led to this condition on the Murphy Farm was installed by Brace in concert with and with assistance from the ASCS and SCS. (Fed. Cir. App. 787-820). Brace received thousands of dollars of financial assistance from these agencies to lay the necessary underground tile and worked with both agencies, specifically the technically sophisticated SCS, in designing and constructing the drainage system to achieve the dry condition that was present on the Murphy Farm in 1979. (Id.) At trial, the former head of the ASCS's Erie office, Joseph Burawa, testified that he personally worked with Brace on this drainage project. (Fed. Cir. App. 106-108). He also testified that these types of drainage systems were common in Erie County. (Fed. Cir. App. 101). The ASCS's program that provided financial and technical assistance to farms to plan and construct such systems was, according to Burawa, the ASCS's most popular program in the 1970s and 1980s. (Id.)

The EPA's Notice of Violations

Between 1987 and 1988, the EPA issued three administrative orders and an administrative complaint (collectively, the "1988 Administrative Complaint") in which it notified Brace of its position that his activities associated with constructing and using the drainage system on the Murphy Farm violated the Clean Water Act. (Fed. Cir. App. 24). At trial, Brace offered unrebutted testimony that this was the first notice he received that his farming of the Murphy Farm and the drainage system he installed with the assistance and guidance of the

ASCS and SCS might violate the CWA. (Fed. Cir. App. 164-165).

In fact, between 1975 and 1987, the applicability of the CWA to drainage systems installed on farms was far from clear. The ASCS and SCS took the position, until 1984, that the construction and operation of drainage systems, like the system installed on the Murphy Farm, did not violate the CWA. (Fed. Cir. App. 76-77). In addition to Burawa's testimony on this point, this fact is also established by the ASCS's request, in 1984, that Brace conduct maintenance on a portion of the drainage system located on the Murphy Farm. (Fed. Cir. App. 124, 275, 307-308, and 817-820.

The Enforcement Action

In 1990, the United States filed suit against Brace in an attempt to assess civil penalties against him and force him to "restore" the wetlands on the Murphy Farm that it believed had been adversely affected by his drainage system (the "Enforcement Action"). (Fed. Cir. App. 888-892). Brace successfully defended that action before the United States District Court for the Western District of Pennsylvania. (App. 82[2]). However, that court's decision was reversed by the United States Court of Appeals for the Third Circuit (the "Third Circuit"), which found that certain exceptions to the Clean Water Act's ("CWA's") regulations did not apply and, therefore, Brace's maintenance and operation of the

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[2] "App." refers to Brace's Appendix submitted with this Petition.

drainage system in 1987 and 1988 constituted a violation of the CWA. (App. 108). Specifically, the Third Circuit held that, in determining whether Brace's drainage activities between 1985 and 1987 qualified under the CWA's normal farming operations exemption, the only area that could be considered was the 30-acre regulated site. Therefore, the Third Circuit would not consider the on-going farming activities that occurred on the Homestead Farm and the upland portions of the Murphy Farm in applying the "established farming operation" exemption. (App. 94-97). The Third Circuit remanded this case to the district court to

> enter judgment in favor of the United States and to assess upon further proceedings appropriate penalties for defendants' violations of the permit requirements, and to assess what, if any, penalties are appropriate for violations of the EPA administrative orders. address the remedial measures necessary to correct the violation.
>
> (App. 108).

The United States Supreme Court denied Brace's petition for a writ of certiorari.

The Consent Decree

On remand, the EPA provided Brace with a proposed consent decree (the "Consent Decree") that would resolve the Enforcement Action. Realizing that the Third Circuit's opinion would require him to engage in significant remedial measures regarding

the Murphy Farm and subject him to the possibility of substantial civil penalties, on June 25, 1996, Brace acquiesced to the terms submitted by the EPA and the United States District Court for the Western District of Pennsylvania entered the Consent Decree as an order of court. (Fed. Cir. App. 168). Under the terms of the Consent Decree, Brace was required to engage in the following relevant actions:

1. refrain from "discharging any pollutants (including dredged or fill material) into the approximately 30 acre wetland site [on the Murphy Farm] . . ., unless such discharge is in compliance with the CWA;

2. "perform restoration in accordance with the wetlands restoration plan"

3. "record this Consent Decree in the applicable land records office."

(Fed. Cir. App. 893-900).

The Consent Decree was expressly designed to restore the Murphy Farm to the condition that existed in 1984. (Fed. Cir. App. 616). The facts are clear and unrebutted that, beginning in 1979 and continuing through the execution of the Consent Decree, a period of time that includes 1984, the Murphy Farm was consistently dry, except for periods of excessive rainfall.

In order to comply with the Consent Decree, Brace proceeded to remove miles of tile and disassemble the drainage system that he, in coordination with the ASCS and SCS, had

constructed over a period of twenty years. (Fed. Cir. App. 168-169). Removal of this drainage system resulted in the Murphy Farm becoming unsuitable for farming. (Fed. Cir. App. 121, 291-296). The "restoration" actions that Brace was required to undertake included the construction of a "check dam" on the Murphy Farm. (Fed. Cir. App. 893-900). The check dam, together with the removal of literally miles of drainage tile and waterways, resulted in regular flooding of the Murphy Farm, a condition that had not occurred since at least 1979. (Fed. Cir. App. 171, 291-293). By the time the Trial Court conducted a view of the property, the ""the water table on [Brace's] property ha[d] risen, indeed, so much, as to create a large pond on the lower half of the property." (App. 17).

Further, the "upland" portions of the Murphy Farm that were not part of the 30-acre site referred to in the Consent Decree were rendered unusable by the Decree. Brace is not permitted to engage in any action that would cause the discharge of any pollutant, including fill, into the wetlands on the Murphy Farm. The unrebutted testimony at trial established that once the drainage system was removed, the upland portions of the farm became highly errodible. (Fed. Cir. App. 301-302). As a result, Brace cannot farm these areas without exposing himself to substantial risk that, either through erosion or other migration of soils or water, pollutants associated with raising farm crops could enter the 30-acre site. (Id.; Fed. Cir. App. 529-532, 543-547, 596, 636, 730-731). If that were to occur, Brace would be subject to possible injunctive action

and civil penalties and contempt under the Consent Decree. (Fed. Cir. App. 893-900).

ARGUMENT

A. The Consent Decree was the Result of Required Acquiescence and, Therefore, can Support a Taking.

The Trial Court and Court of Appeals[3] failed to properly apply this Court's previous holdings regarding the type of government conduct that can result in a taking. The misapplication of this law led those Lower Courts to conclude that that the Consent Decree, by its very nature and regardless of the effect it had on Brace's property, could not cause a compensable taking.

This Court has clearly held that the touchstone of whether a given action or requirement can constitute a taking is whether that action was the result of "required acquiescence." FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987). "This element of required acquiescence is at the heart of the concept of occupation." Id. Based on this straight-forward rule, this Court has held that a state law requiring landowners to permit cable television companies to install cable television equipment on their property constitutes a taking Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982). However, a taking has not

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[3]Because the Court of Appeals affirmed the Trial Court's judgment based on the Trial Court's opinion, both the Trial Court and Court of Appeals will be referred to as the "Lower Courts", when referring to their analysis and reasoning and the substance of the opinion upon which both of their decisions was based.

occurred when a landowner invites a commercial tenant to rent space on the landowner's property and, by extending this invitation, subjects itself to federal statutes that regulated the rent the landowner can charge. Florida Power Corp., 480 U.S. at 252-53. It is this distinction between the invited commercial tenant and the "interloper with a government license" that exemplifies the required acquiescence standard. Id.

Brace did not choose to engage in any action that subjected him to heightened government regulation -- the CWA applies to the Murphy Farm regardless of the use to which Brace puts that farm. Further, Brace did not invite the EPA to place fill and structures on his property. Instead, the EPA took the position that, as applied to Brace's property, the CWA required Brace to take certain remedial actions to comply with the CWA. Based on this position, the EPA issued the 1988 Administrative Complaint and sought to require Brace to change the physical layout of his property, remove drainage tile, add fill and install a check dam. Brace disagreed with the EPA's legal position and resisted its attempt to force him to engage in this conduct on his property.

As a result of Brace's resistance, the EPA began the Enforcement Action in an attempt to force Brace to comply with its demands. Brace mounted a vigorous defense to this action; won at the trial level; lost before the Third Circuit; and was denied review by this Court. At that procedural stage, Brace was left to face a remand to the district court for the sole purpose of determining the appropriate penalties – the Third Circuit had concluded that he violated the

CWA and had directed the district court to enter judgment in favor of the United States. (App. 108). Thus, Brace had lost this legal battle, with no avenues for review. At this point, and only at this point, did Brace acquiesce to the EPA's remedial demands and agreed to engage in the "restoration" activities the EPA presented.

While paying lip service to the required acquiescence standard applied by this Court, the Lower Courts concluded that "it would be hard to fathom how a consent decree could meet the requirements for a taking." (App. 58). The Lower Courts did not rely on the specific facts of this case, nor did they properly consider the compulsion that Brace faced after losing before the Third Circuit and having no avenue of appeal or reconsideration. Instead, the Lower Court's simply concluded that, because consent orders are, by definition, part agreement, they are too voluntary to constitute a taking.

This holding is not a proper application of concept of required acquiescence. This can be seen by assuming that Brace had not resisted the EPA's enforcement efforts but, instead, immediately acquiesced in the restoration efforts they requested. Had that occurred, no enforcement action would have been filed and no consent decree would exist. In such a situation, Brace would have engaged in the restoration actions proposed by the EPA and had been left with his property in the precise situation in which it exists today.

Factually, this hypothetical circumstance would be indistinguishable to the facts addressed by

this Court in Loretto. In Loretto, the property owner did not resist the placement of cable television equipment on her building and, instead, brought suit seeking damages and injunctive relief based on that physical occupation. Loretto, 458 U.S. at 424. In Loretto, this Court concluded that the placement of the cable television equipment on the plaintiff's property pursuant to statutory authority was the result of required acquiescence and could constitute a taking. Applying this precedent to Brace's situation leads to the unavoidable conclusion that had he simply acquiesced prior to the Enforcement Action a taking would have occurred. Like the plaintiff in Loretto, Brace was required to place physical structures (i.e. the check dam and fill) on his property pursuant to statutory authority (i.e. the CWA).

Thus, it is only because of Brace's resistance to the EPA's attempt to force a physical intrusion on this property that the Consent Decree came into existence. The Lower Courts' concluded that this resistance on Brace's part, and the subsequent Consent Decree, made the physical intrusion voluntary. This conclusion results in Brace being deprived of his just compensation because he resisted the Government's intrusion on his property; a result that turns the required acquiescence standard on its head. Brace, far more that the plaintiff in Loretto was "required" to engage in the actions he took. He was required by the EPA and, eventually, by the Third Circuit through its direction to the district court to enter judgment in favor of the EPA. Brace, unlike many property owners, fought the Governments attempt to take his property. The

Lower Courts' conclusion that, through this fight Brace lost his Fifth Amendment right to just compensation is antithical to this Court's precedent.

While this Court has never addressed the issue of whether a consent order can cause a compensable taking, at least one district court case has properly applied the required acquiescence standard to this type of situation. In Scogin v. United States, 33 Fed.Cl. 568, 570-71 (Fed. Cl. 1995), the EPA sought access to the plaintiff's land under the authority granted by CERCLA. Between 1988 and August 1990, the plaintiff entered into multiple agreements with the EPA to allow the EPA access to his land to conduct certain monitoring and other activities on his property. Id. After August 1990, however, the plaintiff was unwilling to allow the EPA any additional access to his property. Id. Consequently, on June 18, 1991, the EPA issued an administrative order requiring the plaintiff to grant the EPA access to his property. Id. at 571. The plaintiff did not comply with this order and, instead, sought to fight it in court. Id. The EPA then filed an enforcement action and, on December 17, 1992, the district court ordered the plaintiff to allow the EPA access to his property or face civil penalties (the "1992 Access Order"). Id. at 572. After the district court issued this order, the plaintiff entered into a lease with the EPA's primary contractor under which the plaintiff agreed to allow the contractor access to his property in exchange for a rental payment of $2,000 per month. Id. at 573-74. The plaintiff then sued the Government, arguing, in part, that the EPA's access of his property after the 1992 Access Order constituted a taking. Id. at 574.

Taking a position identical to its argument in this case, the Government in Scogin argued,

> [T]hat plaintiff was not obligated by the district court's access order to enter into a lease agreement with a government contractor. According to defendant, having chosen to enter into the lease, and having negotiated the terms of the lease, including the compensation to be paid, plaintiff cannot now be heard complaining that the Government has worked a taking by physically occupying his land.
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> Id. at 579.

The claims court did not agree, finding that consideration of the 1992 Access Order was essential to properly understanding the effect of the post-1992 Access Order lease. "Although plaintiff's decision to enter into the lease was voluntary, the lease does not represent plaintiff's consent to the use and occupation of his property, because the access order already had deprived plaintiff of the power to consent." Id. Proceeding in this analysis in a manner directly on point with the present case, the court stated, "A material distinction exists between a consent form freely entered into and a lease agreement entered into that contemplates activities on plaintiff's property which, *but for the district court's access order, plaintiff would not have allowed*." Id. (emphasis added). The Court concluded that, consistent with Supreme Court precedent, required acquiescence was the key to determining whether an agreement could form the

basis of a taking. Based on the 1992 Access Order, the court held, "In this case the district court order authorized a mandatory physical occupation of plaintiff's property. Government compulsion was present." Id.

The facts of Scogin are indistinguishable from the facts in the present case. Like the plaintiff in Scogin, Brace attempted to resist the EPA's efforts to physically occupy his property. Like the plaintiff in Scogin, Brace failed in this effort and was then subject to a court order finding that EPA occupation was required. To address this order, Brace took the same approach the plaintiff in Scogin took – he struck the best deal he could under the circumstances. For Brace, that deal took the form of the Consent Decree. It is beyond dispute that, but for the Third Circuit's decision, Brace would not have allowed the EPA to force the several "restoration" activities mandated by the Consent Decree. As in Scogin, government compulsion was present and led directly to the Consent Decree. Because of this, the Consent Decree was the result of required acquiescence.

It is necessary that this Court correct the Lower Courts' incorrect application of this Court's prior precedent regarding required acquiescence. Allowing that precedent to remain will deprive those individuals who choose to resist government intrusions on their property, only to lose in those efforts, of their constitutional right to just compensation for the takings that result.

B. The Lower Courts' Decision Conflicts with this Court's Precedent in Finding that the Government's Physical Occupation of Brace's Property did not Constitute a Compensable Taking.

The Government's physical occupation of the Murphy Farm constitutes a taking for which just compensation is due under the Fifth Amendment. Specifically, under the authority of the CWA, the Government required that Brace: (1) install a "check dam" to cause the land to flood; (2) place substantial amounts of fill in existing or created ditches; and (3) execute and record an instrument binding all future owners to maintain the physical intrusion required by the Consent Decree. (Fed. Cir. App. 893-900)

The unambiguous language of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. When the Government, exercising its supreme power of eminent domain, physically takes land, the Constitution guarantees payment of just compensation for the land taken. Brown v. Legal Found. of Washington, 538 U.S. 216, 233-34 (2003).

In Loretto, this Court addressed a case where government action required the owner of a private apartment building to allow the installation of cable television cables and boxes on the roof of his building. 458 U.S. at 426. The Court held this permanent, physical occupation of a portion of the plaintiff's roof constituted a physical taking. Id. at 438. Regardless of the reasons for placement, or the degree to which placement interfered with the

plaintiff's use of his property, the act of permanently affixing an object to the plaintiff's roof "took" the rights he previously had in his property to "possess, use and dispose of it." Id. at 435. This Court explained:

> [t]o the extent that the government permanently occupies physical property, it effectively destroys each of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space . . . Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property . . . Finally, even though the owner may retain bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.
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> Id. at 435-36.

The Court concluded that the placement of the cable television cables and boxes on the plaintiff's roof destroyed each of these property rights and, therefore, constituted a physical taking. Id. at 438.

Relying on this Court's clear precedent, other courts have similarly held that any permanent, physical occupation on land constitutes a physical taking. "It is well established that the government may not take an easement without just compensation." Ridgeline, Inc. v. United States, 346 F.3d at 1352 (2003). See also Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979) ("even if the Government physically invades only an easement in property, it must nonetheless pay just compensation"). In Hendler v. United States, 952 F.2d 1364, 1374-75 (Fed. Cir. 1991), property owners brought action against the EPA alleging that EPA's entry onto their land, installation of groundwater wells and monitoring activities were a "taking" of property under the Fifth Amendment. Hendler, 952 F.2d at 1374-75. The Federal Circuit overruled the denial of the plaintiffs' motion for summary judgment on the issue of a physical taking. The court held that the EPA's installation of monitoring wells constituted a physical taking stating, "There is nothing temporary about the wells the Government installed on the plaintiff's property... these surveillance wells are at least as 'permanent' in this sense as the CATV equipment in Loretto, which comprised only a few cables attached by screws and nails and a box attached by bolts." Id. (citing Loretto, 458 U.S. 419 (1982)). In reaching this conclusion, the court "emphasize[d] that **the issue is not whether the Government had the right to impose itself** and its activities on the plaintiffs" and stated "[a] physical occupation of private property by the government which is adjudged to be of a permanent nature is a taking, and **that is true without regard to whether the action achieves an**

important public benefit or has only a minimal economic impact on the owner." Id. (emphasis added).

1. Brace has Suffered a Physical Taking Identical to the Takings in Loretto and Hendler I and the Lower Courts' Decision to the Contrary Conflicts with These Decisions

By means of the Consent Decree, the Government ordered Brace to excavate trenches, destroy drainage tile, fill two drainage ditches and install a check dam. These actions resulted in the creation of a pond on the Murphy Farm. This pond had never before existed on the property. This action constitutes a classic physical invasion of property that is legally indistinguishable from the physical invasions of the plaintiffs' properties in Hendler I and Loretto. In Hendler I, the Government physically took the plaintiff's property by installing wells on the property. In Loretto, the Government's physical invasion sufficient to constitute a taking was the placement of cable television boxes and cables on the roof of an apartment complex. In both cases, and clearly identified in Loretto, the Courts looked to whether the Government's action (1) prevented the plaintiff from physically occupying portions of his property, or barred others from occupying those portions; (2) denied the plaintiff the authority to control the occupied space; and (3) essentially eviscerated the plaintiff's ability to dispose of or sell his property to another without the burden of the government's forced occupancy.

Here, the Government required Brace to place substantial amounts of fill in existing and newly created ditches, and to install a check dam in "unnamed Tributary A." The Government required these actions to change the hydrologic regime of the 30-acre wetlands site on the property. These actions created a pond on the property. These changes were not temporary in nature. They were required to be completed with the utmost urgency (within 90 days if possible) and to remain indefinitely. (Fed. Cir. App. 893-900). These requirements, in and of themselves, constituted a physical taking for which Brace is entitled to just compensation. They (1) deprived him of occupancy of the entire 30-acre parcel and, at a minimum, of the former ditches that the Government required Brace to fill with soil and the area upon which the Government required Brace to construct the check dam; (2) denied Brace the authority to control these areas; and (3) placed a permanent, and recorded cloud over Brace's ownership of the Murphy Farm by requiring any future owner of that property to maintain these physical intrusions.

These several physical invasions also resulted in another physical occupation -- the permanent invasion of the Murphy Farm by both ground and surface water. (Fed. Cir. App. 170, 392-94). The express purpose of the Consent Decree is to "restore the hydrologic regime to the U-shaped, approximately 30-acre wetlands adjacent to Elk Creek." (Fed. Cir. App. 899). To do this, the Government required not only the removal of a drainage system that took a decade to construct and incorporated miles of various drainage mechanisms, it also required the installation of a check dam. The

check dam was not something that existed on the Murphy Farm prior to Brace's purchase. It was a physical structure measuring 1 ½ feet high, 4 feet long and equal in width to the "tributary bottom." Its purpose was to trap water on the Murphy Farm that otherwise would flow over the Murphy Farm and into Elk Creek. (Fed. Cir. App. 899-900).

The Lower Courts concluded that these various physical invasions did not constitute physical takings but, rather, were subject only to analysis as potential regulatory takings. While the Consent Decree also constitutes a regulatory taking, the Lower Courts' conclusion on this point is incorrect for at least two reasons. First, Loretto and Hendler I make no mention of whether a physical occupation was caused by the enforcement of a regulation or some other government action. Instead, those cases clearly establish that any permanent physical occupation by the Government of private property is a taking. Loretto, 458 U.S. at 435-36. This is such a case, with the Government forcing Brace to place physical structures and material on his property and keep them there indefinitely.

Second, the Government is not simply regulating how Brace may use his property. Through the Consent Decree, the Government has ordered Brace to install physical structures previously not present on the Murphy Farm and, in so doing, to create a pond that previously did not exist. This portion of the Consent Decree is not a regulation of use, it is a mandatory command to place tangible objects on Brace's property for the benefit of the public as a whole. This is a paradigmatic physical taking. The fact that it was

ordered by the EPA and affected farm land does not undermine its physical nature.

The Lower Courts' discussion of the "non-sequiter" of treating the denial of a permit and restoration requirements differently is an incorrect analysis under Loretto and an incorrect application of the CWA as it relates to this case. As to Loretto, it does not include any element addressing why the physical occupation occurred. The Federal Circuit has been clear in its position that such issues are irrelevant when analyzing a physical taking. "A physical occupation of private property by the government which is adjudged to be of a permanent nature is a taking, and **that is true without regard to whether the action achieves an important public benefit** or has only a minimal economic impact on the owner." Hendler, 952 F.2d 1374-75 (emphasis added). Thus, the Lower Courts' analysis on this point is simply not relevant to the question of whether the Government's action constituted a physical taking.

Further, the Lower Courts' argument flows from a misapplication of the CWA and a lack of regard for what the Government achieved under the Consent Decree. Between 1975 and 1984, when Brace installed the drainage system at issue, the CWA did not require that Brace seek any permits. (Fed. Cir. App. 76-77). In fact, the ASCS and SCS assisted Brace in constructing and paying for the drainage system. The ASCS and SCS never intimated or believed that Brace required any permit under the CWA to engage in this activity. Thus, for the Lower Courts to analyze Brace's situation as a permitting case is simply not accurate. Further, the

Consent Decree did not "restore" the property to its condition in 1984, as an EPA representative testified was the intent of the Consent Decree. It did not restore the property in any way. The Consent Decree mandated the placement of fill and structures on the Murphy Farm that were never before seen and certainly not present in 1984. These mandated actions resulted in the creation of a pond that, based on the unrebutted evidence at trial, did not previously exist on the Murphy Farm.

Like the wells in Hendler I and the CATV equipment in Loretto, the check dam and fill material used to plug surface ditches constituted physical takings, and the flooding these changes created also resulted in an additional, permanent invasion that constitutes a physical taking. As this Court has made clear, even a minor physical alteration of property constitutes a physical invasion sufficient to give rise to a claim for just compensation. See Loretto, 458 U.S. at 435. The Lower Courts' decision conflicts with this well-established legal principle and with Hendler I. Based on these conflicts, which are premised on the Lower Courts' misapplication of this Court's physical takings analysis, this Court should exercise its discretion to review this case.

C. The Court of Appeals' Decision did not Follow this Court's Precedent in Defining the Relevant Parcel for the Regulatory Takings Analysis.

The linchpin in each of the Government's categorical and regulatory takings arguments at trial, and the foundation upon which the Lower

Courts' analysis on these points is built, is the definition of the "parcel as a whole." This analysis, however, engages in the precise type of manipulation that the "parcel as a whole" inquiry is designed to prevent. This case presents a striking example of the relevant parcel question being manipulated by the Government to, in the first instance, be able to take the property interest it sought and then, after achieving this taking, avoid having to pay just compensation for that interest.

The concept of a "parcel as a whole" in takings cases developed to address attempts to circumscribe total parcels of property to make their "relevant" portions co-terminus with the reach of the government regulation. This so-called "denominator" question was intended to prevent an artificial alteration in the size of the parcel at issue to serve either side in litigation. See e.g., Walcek v. United States, 49 Fed. Cl. 248, 259 (2001).

While clear that the parcel as a whole question is designed to avoid artificially defining the relevant parcel in takings cases, this Court's precedent has been inconsistent on the application of that test to different factual situations. For instance, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922), this Court struck down a statute because it made it "commercially impracticable to mine certain coal." The Court did not look to whether other coal on the plaintiff's property could be mined. Instead, it focused on the coal that was affected by the regulation and found that regulation to violate the Takings Clause because it had the same effect of "appropriating or destroying" the affected coal. Sixty-five years later, this Court faced a similar

question in Keystone Bitumimous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496-97 (1987). There, the Court had to determine whether a regulation affecting the plaintiff's ability to mine coal constituted a taking. Despite relying on Mahon, and specifically reaffirming that decision, the Court looked to other coal on the property that remained available to mine and found that sufficient economic value remained to avoid a regulatory taking. Id. at 497-98.

While these decisions have left this important law unsettled, later Supreme Court cases have provided additional support for the approach taken in Mahon. In Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1993), the Court indicated that the proper focus in defining the relevant parcel is to look at "to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value."

The principal case from this Federal Circuit has also supported defining the relevant parcel based on the portion of land that has been regulated. In Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1180 (Fed. Cir. 1994), this Court had to determine what portion of a developer's holdings were the relevant parcel. The developer had originally purchased 250 acres of property. In 1982, it sold 199 acres, and continued to own 51 acres. On May 5, 1982, the Army Corps of Engineers denied the plaintiff's request for a fill permit under the CWA, which the developer needed to develop 12.5 of their remaining 51 acres. Addressing the

denominator question, the Court held that the 12.5 acres of affected land constituted the relevant parcel. See also Palm Beach Isle Associates v. United States, 208 F.3d 1374 (Fed. Cir. 2000).

The holdings in these cases, defining the relevant parcel as the regulated land, are consistent with Mahon and represent the most reasonable and equitable approach to the denominator problem. By defining the relevant parcel as that land which has been regulated, the Court avoids any manipulation by the government or the claimant in an attempt to change the "denominator" to affect the overall economic impact of the regulation. Further, the result of this analysis focuses on what has been taken from the claimants. This is particularly true in this case.

The question of what is the relevant parcel in this case was a key question in both the Enforcement Action and this present suit. In the Enforcement Action, Brace argued, and the district court accepted, that his actions on the Murphy Farm were exempt from regulation under the CWA because they were part of an "established (i.e. on-going) farming operation." 33 C.F.R. § 323.4(a)(1)(ii). However, on appeal, the Third Circuit disagreed with this conclusion and found that Brace's activities on the Murphy Farm did not qualify for this exemption. Importantly, in analyzing this point, the Third Circuit held that the district court misinterpreted the meaning of the "established farming operation" requirement because it examined the relationship of the site in question to the rest of the land owned by Brace, including other land on the Murphy Farm and the Homestead Farm, in determining whether land

was being brought into farming use. The Court stated:

> We cannot agree with this interpretation of the statute's requirement. The regulations provide that, 'activities which bring an area into farming . . . use are not part of an established operation.' The regulations do not specify the precise area to which we should look in determining whether there is an established farming operation. There are no minimum limits placed on the "area" being brought into farming use. Thus, we read the regulations to provide that an exemption is available only to activities that are part of an 'established farming operation' at the site. A proper 'contextual review of its total activities' only requires us to analyze whether such activities are 'established and continuing' on the thirty-acre wetland site itself.

United States v. Brace, 41 F.3d 117 (3d Cir. 1994), *cert. denied*, 515 U.S. 1158 (1995) (internal citations omitted) (App. 96). By taking this position, the Government and Third Circuit did not allow Brace to reap the benefits of including the other acreage on the Murphy Farm or the Homestead Farm in this analysis.

In this action, however, the Government has thus far successfully argued that both the Murphy and Homestead Farms must be included as the relevant parcel. This argument is a perfect illustration of the gaming of the relevant parcel analysis that can occur when it is defined as

anything other than the regulated parcel. While Brace was not able to consider his activities on the Homestead Farm or upland portions of the Murphy Farm for purposes of determining whether he qualified for an exemption under the CWA, he has been required to included the economic benefit of those activities, and the land on which they are performed, to determine whether the Government's conduct constitutes a regulatory or categorical taking. This analysis is nothing more than a "bait and switch" game being engaged in by the Government to avoid its constitutional obligation to pay Brace just compensation for the property interest it has taken. By allowing the Government to successfully engage in this gaming of the analysis, the Lower Courts have misapplied this Court's precedent, violated precedent from the court of appeals for the federal circuit, and exploited the ability to manipulate the multi-factored approach this Court has taken to this question. This Court should grant review of this case to correct this result in this case, properly define the relevant parcel as the 30 acre regulated parcel, and announce a bright line test defining the relevant parcel for takings analysis as a the parcel being regulated.

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No. 07-916

IN THE

Supreme Court of the United States

ROBERT BRACE,

Petitioner

v.

THE UNITED STATES,

Respondent

APPENDIX
to Petition For Writ of Certiorari
To The United States Court of Appeals for the
Federal Circuit

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NOTE: This disposition is nonprecedential.

United States Court of Appeals For the Federal Circuit

2007-5002

ROBERT BRACE,

Plaintiff,
Appellant,

v.

UNITED STATES,

Defendant-
Appellee,

Neal R. Devlin, Knox McLaughlin Gornall & Sennett, P.C., of Erie, Pennsylvania, argued for plaintiff-appellant. With him on the brief was Richard A. Lanzillo.

Tamara N. Rountree, Attorney, Environment & Natural Resources Division, United States Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Matthew J. McKeown, Acting Assistant Attorney General, Susan Cook, Attorney, and Kathryn Kovacs, Attorney. Of counsel was William B. Lazarus, Attorney. Of counsel on the brief was Dana Ott, Office of General Counsel, United States Environmental Protection Agency, of Washington, DC.

Richard P. Rector, DLA Piper US LLP, of Washinton, DC, for amicus curiae, National Association of Home Builders.

Appealed from: United States Court of Federal Claims

Judge Francis M. Allegra

NOTE: This disposition is nonprecedential.

United States Court of Appeals For the Federal Circuit

2007-5002

ROBERT BRACE,

Plaintiff,
Appellant,

v.

UNITED STATES,

Defendant-
Appellee,

DECIDED: October 10, 2007

Before MICHEL, Chief Judge, LOURIE, and GAJARSA, Circuit Judges.

PER CURIAM.

The judgment of the lower court is affirmed based upon the well-reasoned opinion of the trial court.

In the United States Court of Federal Claims

No. 98-897 L

(Filed: August 4, 2006)

ROBERT BRACE	*	Trial: Wetlands on farm property; Consent decree in enforcement action under the Clean Water Act; Fifth Amendment; Regulatory takings; *Penn-Central* factors; Economic impact; Reasonable investment-backed expectations; Character of government action; Physical takings; Impact of consent decree; Limitations on use of property properly considered as regulatory takings; Conservation easement; No taking found.
Plaintiff	*	
v.	*	
THE UNITED STATES	*	
Defendant.	*	

OPINION

Nancie G. Marzulla, Roger J. Marzulla and *Brenda D. Colella,* Marzulla & Marzulla, Washington, D.C., for plaintiff.

Susan Cook Florentine and *Sydney F. Cook*, U.S. Department of Justice, Washington, D.C., for defendant, with whom was *Acting Assistant Attorney Kelly A. Johnson.*

ALLEGRA, Judge:

"And then I know of no better way
To close a road, abandon a farm,
Reduce the births of the human race,
And bring back nature in people's place"[1]

This takings case is before the court following a trial in Washington, D.C. Plaintiff, Robert Brace, comes from a long line of farmers in Erie County, Pennsylvania. Significant portions of the land that now constitutes his farm were, for many years, drained with the complicity and assistance of the United States Department of Agriculture (USDA). But, when, after acquiring this property from his parents, plaintiff attempted to fill and drain the wetlands thereon, the Environmental Protection Agency (EPA) filed an enforcement suit against him, ultimately resulting in the entry of a consent decree that required plaintiff to take various remediation steps. Plaintiff contends, *inter alia*, that the actions

[1] Robert Lee Frost, *The Times Table* (1928).

of the government have effectuated either a regulatory or physical taking of his property under the Fifth Amendment.

I. FINDINGS OF FACT

Based upon the record, including the parties stipulation of facts, as well as matters collaterally established in the prior enforcement proceeding between the parties, the court finds as follows:

Mr. Brace and his wife, in varying capacities, own approximately 600 acres in south-central Erie County, Pennsylvania, approximately 3 miles northwest of the town of Waterford. Among this land is an approximately 134-acre parcel that Mr. Brace purchased for $170,000 from his parents in December of 1975.[2] As the accompanying diagram illustrates, that parcel lies along Greenley Road, and is bisected into northern and southern tracts by South Hill Road. The portion to the north, approximately 69 acres, is the so-called "Homestead Farm," while the approximately 65 acres of property located to the south, which include the approximately 30 acres of wetlands at issue herein,

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[2] Plaintiff claims that this acquisition occurred in a hand-shake deal in the spring of 1975, but, on balance, the record indicates that a legally-binding acquisition did not occur until at least September of that year, and, more likely, December thereof. The claim of an earlier sale is based entirely on the testimony of Mr. Brace. However, despite having been deposed on this subject for both this case and the earlier enforcement action, Mr. Brace never mentioned the hand-shake deal until the trial in this matter. Accordingly, the court discounts his testimony in this regard.

is the so-called "Murphy Farm."[3] Over time, Mr. Brace has grown a variety of crops on this land, including oats, other grain, corn, cabbage (for which he is particularly known), and potatoes.

Plaintiff's family first acquired portions of the land at issue during the 1930s. Plaintiff's father, Charles D. Brace, augmented his Erie County holdings in the early 1940s. In its natural state, this land is not the best farmland. According to an exhibit in the record, "[t]he soil in Erie County, Pennsylvania ... requires continuous draining in order to be suitable for cultivation," "[e]xtensive underground drainage systems are typical and necessary aspects of farming in Erie County," and "installation of such systems is a normal farming

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[3] These properties adjoin a 135.11 acre parcel owned by Robert Brace Farms, Inc. and a 46.16 acre parcel owned by Robert Brace & Sons, Inc.

activity in order to make land suitable for farming." Beavers have traditionally lived on and around the site. Due to the presence of Beaver dams, portions of the Murphy Farm have periodically been inundated with water.

In 1961, the Soil Conservation Service (SCS), part of the USDA and now known as the Natural Resources Conservation Service (NRCS), developed a "Soil and Water Conservation Plan" for plaintiff's father. This plan covered both farms, and identified which crops were appropriate for particular fields therein, as well as which fields could be improved by the installation of drainage. Like the drainage plans for many farms in Erie Country,[4] the SCS plan proposed using tiles and ditches to drain the fields in order to make them more suitable for farming, particularly for row crops.[5] Specifically, as illustrated by the accompanying diagram, the SC S's plan was

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[4] By one estimate, between 1978 and 1985, 75 percent of the soil conservation projects coordinated by the SCS involved installing drainage systems. Some of these involved fields that were being actively farmed, but would, but for that farming, have been considered wetlands subject to the permitting process of the Clean Water Act (CWA).

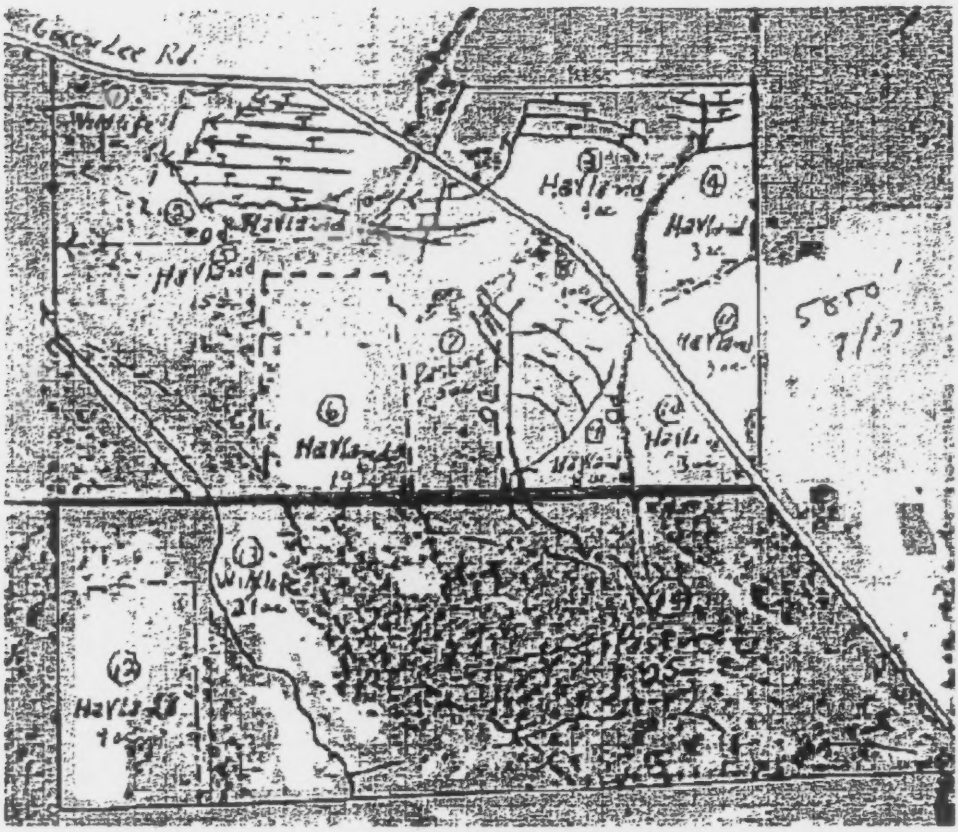
[5] At trial, Mr. Joseph Burawa, former County Executive Director for the USDA's Agricultural Stabilization and Conservation Service (ASCS) in Erie County, testified that, from the 1960s to the 1980s, it was common for the USDA to assist farmers in installing drainage or "tile underdrain" systems on farms in Erie County, noting that this was the "most popular practice." "During that era," he further testified, "I was aware of the fact that the government, through entitlements for tiling and diversions and conservation plans, there was money available for farmers to tile, to enhance their property, lower the water table if you will so they could actively farm that. Production agriculture."

designed to drain fields on the Homestead Farm labeled 3, 4, 6, 7, 8, 9, 10, and 11 in a southeasterly direction under South Hill Road and into an unnamed tributary located on the Murphy Farm in what was labeled field 14. From there, the unnamed tributary channeled the water drained from the Homestead Farm and the water from the Murphy Farm in a westerly direction across the Murphy Farm and into Elk Creek, located in what was labeled field 13. Elk Creek then flows in a northwesterly direction, under South Hill Road and onto the Homestead Farm before proceeding on to Lake Erie. As designed, the flow of water across the Murphy Farm was an integral part of the SCS's plan because the Murphy Farm acts as the conduit through which the Homestead Farm drains.

After obtaining the conservation plan, Mr. Brace's father began implementing some of its recommendations. He excavated ditches on both the Homestead and Murphy farms to get more productive pasture and row crop, and installed a diversion ditch that interconnected the drainage plans on the farms. Mr. Brace's father also renovated pasture land and cleared brush in accordance with the SCS plan. He did not, however, complete all the work envisioned by the plan and, in at least one instance, employed a field as pasture that the conservation plan envisioned would be used as a wildlife area. During this period, the wetlands were used primarily as pastureland, particularly for grazing cattle.

The CWA, which was passed in 1972, prohibits the "discharge of any pollutant by any person" into "navigable waters" without a permit. 33 U.S.C. §§

1311(a), 1344(a). On April 3, 1974, the Army Corps of Engineers (the Corps) published regulations implementing the CWA. *See* 42 Fed.Reg. 37,122, 37,123 (July 19, 1977). These regulations limited the application of the CWA to "waters that are subject to the ebb and flow of the tide shoreward to their mean high water mark (mean higher water mark on the West Coast) and/or waters that are presently used, were used in the past, or are susceptible to use to transport interstate or foreign commerce." *Id.* at 37,123. However, as a result of a court order, on July 25, 1975, the Corps published interim final regulations extending the jurisdiction of the CWA "over discharges of dredge and fill material to many areas that [had] never before been subject to Federal permits or to this form of water quality protection." 40 Fed.Reg. 31,320 (July 25, 1975). These regulations more broadly defined "navigable waters" to include those wetlands that were "periodically inundated by freshwater and normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." *Id.*



Five months after the latter regulation was promulgated, the subject property was sold to plaintiff.[6] At this time, the site was vegetated with areas of scrub brush, including red brush and briars. Mr. Brace obtained a copy of the SCS plan prepared for his father; he previously knew the plan existed. On July 19, 1977, the Corps adopted final regulations implementing a number of proposed changes. 42 Fed.Reg. 37,125 (July 19, 1977). A few months later, Congress amended the CWA to exempt "normal farming activities" on "established farming

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[6] Sometime after this purchase, Mr. Brace purchased an additional adjacent 140 acres from his cousins, increasing his contiguous farm holdings to approximately 270 acres.

operations" from the Section 404 permit requirement. Pub.L. 95-217, § 67, 91 Stat. 1566 (Dec. 27, 1977) (codified at 33 U.S.C. § 1344(f)(1)(A)) ("normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products or upland soil and water conservation practices"); 1344(f)(2) ("Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.").[7]

In the spring of 1977, plaintiff decided to discontinue the grazing that had occurred on the Murphy Farm. From 1977 through 1979, he obtained technical and financial assistance from agencies within the USDA, including surveying and funding

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[7] In 1993, the EPA and the Corps promulgated regulations which provide that the "normal farming activities" exemption is available only to discharge activities that are "part of an established (i.e., on-going) farming ... operation," and expressly stipulate that the exemption is not available either: (i) for "[a]ctivities which bring an area into farming ... use"; or (ii) where "modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. § 323.4(a)(1)(ii) (1993); 40 C.F.R. § 232.3(c)(1)(ii)(A), (B) (1993).

for installing an underground*343 drain system.[8] In particular, on March 7, 1977, Willie L. Ruffin, a District Conservationist with the ASCS, provided technical assistance in mapping out a drainage system entailing portions of both the Homestead and Murphy Farms. When completed on July 14, 1977, that plan entailed the installation of 4,920 feet of 4-inch underground drain tile, 50 feet of 6-inch steel pipe and 880 feet of 6-inch underground drain tile. On April 13, 1978, Mr. Ruffin provided technical assistance on a second drainage system. When completed on May 2, 1978, that system entailed the installation of 5,050 feet of 4-inch underground drain tile and 30 feet of 4-inch steel pipe outlets. On March 20, 1979, Lewis Steckler, another ASCS technician, provided technical assistance mapping out a third drainage system. When completed in July 1979, that system entailed the installation of 350 feet of 4-inch underground drain tile and 650 feet of six-inch underground drain tile. In addition, an 825-foot of sod waterway was constructed. As a result of these efforts, by the end of 1979, the site was dry, with the exception of times of excessive rainfall. Further maintenance on this drainage system was conducted in 1984, to repair damage from a flood. Sometime between July and October of 1984, the USDA provided funding for this maintenance, with officials

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[8] At the time this assistance was provided, the SCS had a policy prohibiting providing assistance with respect to wetlands. However, as defined at that time, such wetlands did not include property that was being actively farmed. Moreover, for property that was idle, the SCS definition of wetlands was narrower than that which would eventually be employed under the CWA.

in the local office of the ASCS operating on the view that farmers were exempt from the CWA.

Between 1985 and 1987, in an effort to further drain his property, Mr. Brace installed tile and rubber tubing beneath the ground and removed various materials that were impeding the flow of water through the various ditches. At some point during this period, Mr. Brace, without obtaining a permit under the CWA,[9] discharged dredged and fill material onto the 30-acre wetland site. In May of 1987, the United States became aware of this and, beginning on July 15, 1987, and then twice in 1988, it issued orders directing plaintiff to cease maintenance and operation of the drainage system on the property and to submit a plan to restore portions of the property to its prior wetlands condition. The orders and related correspondence threatened a range of civil penalties and possible criminal prosecution. In October of 1988, Mr. Brace received an administrative complaint in connection with his activities on the site, proposing to assess a penalty of $125,000 for various CWA violations. He

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[9] As amended in 1972, see the Federal Water Pollution Control Act Amendments of 1972, Pub.L. 92-500, 86 Stat. 816, the CWA bans all discharges of pollutants from point sources unless a permit has been obtained. See 33 U.S.C. §§ 1311-1344. Specifically, section 301 of the CWA states that "[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful." Id. at § 1311(a). Section 404 authorizes the Secretary of the Army, acting through the Chief of Engineers, to "issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.* at § 1344(a).

requested a hearing to contest the complaint, but prior to the hearing, the complaint was dismissed.

During the summer 1988, after receiving the last of the orders, Mr. Brace contacted the ASCS and requested that his property be granted the status of "commenced conversion from wetlands" prior to December 23, 1985. Eventually, the ASCS granted "commenced conversion" status as to some of plaintiff's fields, including several on the Homestead Farm tract, but did not so designate any of the fields located within the wetlands area of the Murphy Farm tract.[10] In 1990, the United States filed an enforcement action against plaintiff in the U.S. District Court for the Western District of Pennsylvania. In 1993, the district court entered judgment in favor of Mr. Brace on the ground that his activities were exempt from the permitting requirements of section 404 of the CWA. On appeal, the United States Court of Appeals for the Third Circuit reversed, finding that Mr. Brace's "drainage activities on the thirty-acre wetland site were not exempt under the 'normal farming activities' " exception to the CWA permit requirement. *United States v. Brace*, 41 F.3d 117, 129 (3rd Cir.1994), *cert. denied*, 515 U.S. 1158, 115 S.Ct. 2610, 132 L.Ed.2d 854 (1995). On remand, the case was concluded by entry of a consent decree (the Consent Decree) which permanently enjoined Mr. Brace from "discharging any pollutants (including dredged or fill material) into the approximately 30 acre wetland site, ...

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[10] A letter of February 2, 1989, from the Fish and Wildlife Service to the EPA confirmed that the ASCS had previously paid Mr. Brace for ditching and underground drainage.

unless such discharge is in compliance with the CWA." That decree incorporated a wetlands restoration plan that required Mr. Brace to remove or disable drainage tile, excavate certain parts of his property and fill in certain surface drainage ditches, and install a check dam over a tributary that ran through the wetlands. That work was to be completed, if feasible, within 90 days after the entry of the Consent Decree and, in any event, no later than one year after entry of the decree.[11] The Consent Decree mandated that "within thirty days after the entry of this Consent Decree, Defendants will record this Consent Decree in the applicable land records office."

As verified by EPA inspections and ASCS officials, plaintiff subsequently complied with the Consent Decree. Per the restoration plan, after digging trenches to intersect materials that had been buried underground, Mr. Brace removed extensive amounts of tile and drainage tunnels from his property. He thereby essentially destroyed portions of the system that had previously been constructed to drain portions of the property, all in an effort to restore what one EPA official described as the "hydrologic drive of the [ ] wetlands" to where it was

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[11] The restoration plan further indicated that "[t]he site will be inspected at the completion of the trench work and again at the completion of the restoration work." Consistent with this provision, the decree indicated that "[i]n addition to any other legal authority, representatives of the United States will have the authority for a period of eighteen (18) months after the entry of this Consent Decree, at reasonable times and with proper identification, to enter upon the property affected by this Consent Decree for the purpose of monitoring and measuring compliance with this Consent Decree."

in 1985. Per the plan, Mr. Brace also installed the check dam, which was designed to counteract dredging that had occurred on one of the tributaries on the property. For reasons that are unclear, the water table on plaintiff's property has risen, indeed, so much, as to create a large pond on the lower half of the property. Plaintiff contends that approximately 40 to 50 acres of the combined Murphy and Homestead Farms is now unusable. Plaintiff also construed the Consent Decree as making it impossible for him to farm uplands adjoining the wetlands, based on concerns that erosion from the uplands would impact the wetlands. However, despite claims that the Consent Decree was overreaching and impacted property outside the wetlands, plaintiff neither sought modification of the decree, nor clarification from the EPA, either formally or otherwise, as to his obligations thereunder or his ability to use the upland portions of the farm property. After 1996, no EPA official has ever visited the property to determine whether the restoration plan had broader impacts than were intended.

On November 25, 1998, Mr. Brace filed this action for the taking of his property without just compensation, in violation of the Fifth Amendment to the United States Constitution. On December 1, 2000, the court denied defendant's motion for summary judgment, but ruled against plaintiff with respect to certain aspects of his regulatory takings argument. *Brace v. United States*, 48 Fed.Cl. 272 (2000) (*Brace I*). Subsequently, the court again denied defendant's renewed motion for summary judgment, finding that material questions of fact

existed. *Brace v. United States*, 51 Fed.Cl. 649 (2002) (*Brace II*). This court conducted a trial on liability and damages from January 11-14, 2005, taking testimony from witnesses and accepting exhibits into evidence. At the trial, the court received, *inter alia*, expert testimony regarding the impact of the Consent Decree and resulting restoration activities on the value of plaintiff's property. However, these experts were not instructed by counsel to evaluate the same parcels.

Thus, plaintiff's expert, James E. Lignelli, valued only the Murphy Farm portion of the property, a tract that he set at 58 acres, thirty of which constituted the wetlands. He testified that, despite 12.7 acres of the property being located within a 100-year flood plane, the highest and best use of the property was as a residential subdivision. In evaluating the property as a subdivision-the first of its type in the township of Waterford, Pennsylvania-Mr. Lignelli did not independently determine the feasibility of such a project, including whether appropriate approvals, zoning changes or variances, and permits could be obtained from the relevant Federal, state and local authorities. Rather, he relied on oral representations he received from Mr. Lynn Hofius (who did not testify) that it was likely the requisite approvals, zoning changes and permit would be obtained.[12] Mr. Lignelli set the price

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[12] Nor did Mr. Lignelli account for the location of a water or sewer plant, or for the potential cost of developing a paved road to the subdivision. The former were not part of the plans that he received from a surveying group hired by plaintiff, and the latter was assumed to be a cost that the Waterford Township would volunteer toward the project.

of the property at the level if would command under options if, in fact, those approvals, changes and permits were actually obtained.[13] He indicated that if any of his critical assumptions were not borne out, his conclusions would be "null and void." Relying on his discounted cash flow analysis and using various cost figures for the development of sewage, roadways and utilities that were supplied to him (again by individuals who did not testify), Mr. Lignelli opined that, absent the decree and restoration activities, the

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[13] In concluding that the proposed development was economically feasible, Mr. Lignelli's report further assayed-

> Market data and analysis ... indicates that adequate demand exists for single family dwelling and single family lots available for single family residential development whereby the absorption rate of single family lots priced between $32,000 and $66,000 is from six lots during the first year of the sell-out period to a range from eight to thirteen lots per year during years two through 12 of the projected 12-year sell-out period.

Although admitting that "no large scale residential subdivision has been developed in Waterford Township," Mr. Lignelli emphasized that population growth in Waterford Township supported his conclusion, noting that the population of the Township had increased, between 1980 and 1990, by 528 persons, to 3,402. While Mr. Lignelli projected that the population of Waterford Township would increase to 4,161 in 2000, census data contained in a report filed by defendant indicates that the total population of the township in that year was only 3,878. See U.S. Census Bureau, Table DP-1, Profile of General Demographic Characteristics: 2000, for Waterford Township, Erie Cty., Pa., available on http://www.census.gov/census2000/states/pa.html (as viewed on August 4, 2006). As reflected in defendant's report, between 1990 and 2000, the number of housing units in Waterford Township increased by 23.4 percent, from 1,173 to 1,446.

fair market value of the property in 1996 would have been $455,000.[14] Although he did not detail his reasoning in his report, he concluded that with the decree and restoration in place, the property had "scant value," that is, less than $5,000. The latter valuation, in his view, obtained even as to the uplands portion of the property, the value of which he believed was tainted by the "regulatory risk" of being associated with wetlands covered by a consent decree.

By comparison, defendant's expert, George F. Silver, valued a parcel corresponding to both the Murphy and Homestead Farms, representing a total acreage of 134.33 acres.[15] He found that the highest and best use of the property was as a diversified cash crop farm, particularly based upon the quality of certain soils (Howard and Phelps) found there. Using a sales comparison approach, Mr. Silver found that if the wetlands were drained and could be used for row crops-essentially the state of the land before its restoration-the fair market value of the property in

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[14] Mr. Lignelli adopted this figure as compared to a value of $293,000 that he produced using a sales comparison approach. He viewed the latter figure as providing a "less reliable and accurate estimate of market value."

[15] The parties, in fact, even disagreed as to the overall size of the Murphy Farm, with Mr. Silver, relying on various tax records, setting that parcel at 65 acres, rather than the 58 acres used by Mr. Lignelli. Mr. Brace claimed to have had the property surveyed, but could neither provide the exact date of the survey, the name of the surveying firm, the name of the surveyor, nor a copy of the survey. The court, therefore, discounts his testimony on this point.

1996 would have been $355,000.[16] Mr. Silver rejected a highest and best use of the property as a subdivision, finding that the market for houses in the Waterford area was for large 5 to 10-acre lots. He further found that such a development was infeasible owing, in part, to the absence of public utilities and to the likelihood that state and local officials would refuse to provide the permissions and permits needed to convert the property because of its hydric soils.[17] Using comparable sales of property that included hydric soils, Mr. Silver found that with the wetlands restored-in other words, with the 30 acres now a wetlands area-the value of the property would

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[16] Mr. Silver derived his figure based on 14 sales of improved agricultural properties in Erie County and other counties in the general area, for which he provided extensive data. Those sales involved parcels ranging from approximately 98 acres to 421 acres, with available tillage ranging from approximately 45 acres to 190 acres. Included among the preliminary information that Mr. Silver surveyed was the 2001 purchase by Robert Brace & Sons, Inc. of 249 acres in Waterford Township for $455,000. From these sales, Mr. Silver selected eight sales that he felt were most comparable. Mr. Silver adjusted these figures to account for, inter alia, the value of improvements and the types of soil involved.

[17] In reaching the latter finding, Mr. Silver talked directly with officials at the Waterford Planning Commission and the Pennsylvania Department of Environmental Protection.

have been reduced in 1996 to $305,000.[18] In reaching the latter conclusion, Mr. Silver discounted the notion that the existence of the Consent Decree would diminish the value of land on the property that is not wetlands. Ultimately, he determined that, as a result of the wetlands restoration, the value of the subject property was diminished by $50,000, or approximately 14 percent.

On April 8, 2005, the court conducted a site visit to the Murphy and Homestead Farms, as well as the surrounding area. Subsequently, the court received post-trial briefs and conducted a closing argument.

II. DISCUSSION

In deceptively simple terms, the Takings Clause of the Fifth Amendment commands: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. As explained by the Supreme Court, "[t]he aim of the Clause is to prevent the government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (quoting *Armstrong v. United States*, 364 U.S. 40, 49,

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[18] In calculating this number, Mr. Silver valued portions of the property that, in the "before" state, he had viewed as "tillage" at $2,500 per acre as instead "open to wooded wetland" at $400 per acre. While Mr. Silver could not adjust his figures to correspond to the smaller acreage used by Mr. Lignelli, he testified that, all things being equal, the per acre value of a smaller parcel generally is higher than that of a comparable larger parcel.

80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960)); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 618, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). Most cases interpreting the Clause fall into one of two classes. As explained by the Supreme Court-

> Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 [, 102 S.Ct. 3164, 73 L.Ed.2d 868] (1982). But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-125[, 98 S.Ct. 2646, 57 L.Ed.2d 631] (1978). The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.

Yee v. City of Escondido, 503 U.S. 519, 522-23, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) (parallel citations omitted); *see also Tahoe-Sierra Preserv. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321, 122

S.Ct. 1465, 152 L.Ed.2d 517 (2002); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1180-82 (Fed.Cir.1994). Here, plaintiff alleges both forms of takings have occurred. The court will consider his regulatory and physical takings claims *seriatim*.

A. Regulatory Taking

Justice Holmes long ago opined that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 67 L.Ed. 322 (1922); *see also Palazzolo*, 533 U.S. at 617, 121 S.Ct. 2448. This familiar language is the genesis of the so-called regulatory takings doctrine, first invoked to challenge mining and zoning laws, but here raised in contending that the regulation of plaintiff's farm has effectuated a takings.

A property owner may show that the government has effectuated a "categorical taking" by demonstrating that a regulation has denied him of "all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Norman v. United States*, 429 F.3d 1081, 1090 (Fed.Cir.2005), *cert. denied*, --- U.S. ----, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2006). In addition, "[w]here a regulation places limitation on [property] that fall short of eliminating all economically beneficial use," the Supreme Court has stated, "a taking nonetheless may have occurred depending on a complex of factors." *Palazzolo*, 533 U.S. at 617, 121 S.Ct. 2448; *see also Brown v. Legal Found. of Washington*, 538 U.S. 216, 233, 123 S.Ct. 1406, 155

L.Ed.2d 376 (2003) (noting that such cases require an " ad hoc factual inquiry"); *Tahoe-Sierra*, 535 U.S. at 335, 122 S.Ct. 1465 (must determine whether under "all the relevant circumstances" a taking is established). In 1978, the Supreme Court added some framework to this inquiry by identifying three criteria that are particularly significant in determining whether governmental action constitutes a taking: (i) "[t]he economic impact of the regulation on the claimant;" (ii) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (iii) "the character of the governmental action." *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646; *see also Palazzolo*, 533 U.S. at 617, 121 S.Ct. 2448.[19] None of these factors are "decisive in themselves but rather must be weighed in a balance that takes into account all of the circumstances." *Cienega Gardens v. United States*, 67 Fed.Cl. 434, 466 (2005); *see also Tahoe-Sierra*, 535 U.S. at 322, 122 S.Ct. 1465; *Palazzolo*, 533 U.S. at 635-36, 121 S.Ct. 2448 (O'Connor, J., concurring). Yet, in the composite, these factors are designed to "identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

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[19] See also Good v. United States, 189 F.3d 1355, 1360 (Fed.Cir.1999), cert. denied, 529 U.S. 1053, 120 S.Ct. 1554, 146 L.Ed.2d 459 (2000); Creppel v. United States, 41 F.3d 627, 631 (Fed.Cir.1994); Loveladies Harbor, 28 F.3d at 1179; Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1567 (Fed.Cir.1994), cert. denied, 513 U.S. 1109, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995); Arctic King Fisheries, Inc. v. United States, 59 Fed.Cl. 360, 368-69 (2004).

1. Defining the Parcel as a Whole

As a threshold matter, in applying either form of the regulatory takings analysis, the court must focus on the "parcel as a whole." As Justice Brennan's opinion in *Penn Central* emphasized-

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole....

Penn Central, 438 U.S. at 130-31, 98 S.Ct. 2646; *see also Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348 (Fed.Cir.2004), *cert. denied*, 543 U.S. 1188, 125 S.Ct. 1406, 161 L.Ed.2d 191 (2005). In *Tahoe-Sierra*, 535 U.S. at 328, 122 S.Ct. 1465, the Supreme Court indicated that defining the relevant parcel required consideration of the "aggregate ... in its entirety." It rejected the notion of conceptual severance, under which the takings analysis could be applied only to the portion of a larger property most directly burdened by a regulation, reasoning-

> Of course, defining the property interest taken in terms of the very regulation being challenged is circular.... Petitioners' "conceptual severance" argument is unavailing because it

> ignores *Penn Central's* admonition that in regulatory takings cases we must focus on "the parcel as a whole." 438 U.S. at 130-131, 98 S.Ct. 2646. We have consistently rejected such an approach to the "denominator" question.

Id. at 331, 122 S.Ct. 1465; see *also Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.").

In applying the "parcel" as a whole concept, the court must focus on "the economic expectations of the claimant with respect to the property" and whether a given property is treated as a "single economic unit." *See Norman*, 429 F.3d at 1091; *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed.Cir.), *cert. denied*, 528 U.S. 951, 120 S.Ct. 373, 145 L.Ed.2d 291 (1999). Additional relevant factual considerations in making the "parcel as a whole" determination include: (i) the degree of contiguity between property interests; (ii) the dates of acquisition of property interests; (iii) the extent to which a parcel has been treated as a single income-producing unit, and (iv) the extent to which the regulated lands enhance the value of the remaining lands. *Loveladies Harbor*, 28 F.3d at 1180; *Cane Tennessee, Inc. v. United States*, 62 Fed.Cl. 703, 709 (2004); *Forest Props., Inc. v. United States*, 39 Fed.Cl. 56, 74 (1997), aff'd, 177 F.3d 1360 (Fed.Cir.), *cert. denied*, 528 U.S. 951, 120 S.Ct. 373, 145 L.Ed.2d 291

(1999); *Ciampitti v. United States*, 22 Cl.Ct. 310, 318 (1991). These factors often have led courts to combine wetlands with surrounding uplands, treating the composite property as the parcel as a whole. *See Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed.Cir.1993) (stating that "[c]learly, the quantum of land to be considered [in a regulatory takings case involving wetlands regulations] is not each individual lot containing wetlands or even the combined area of wetlands," but rather the "parcel as a whole") (emphasis in original); *Deltona Corp. v. United States*, 228 Ct.Cl. 476, 657 F.2d 1184, 1188 (1981), *cert. denied*, 455 U.S. 1017, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982); *Walcek v. United States*, 49 Fed.Cl. 248, 258-59 (2001), *aff'd*, 303 F.3d 1349 (Fed.Cir.2002) (citing additional cases).

In the case *sub judice*, the evidence points to treating the Murphy and Homestead Farms together as the "parcel as a whole." These farms are contiguous, were acquired in a single conveyance for a single consideration of $170,000, are reflected in a single deed, and contain an integrated drainage system that begins on the Homestead Farm and drains into and through the Murphy Farm. Even before they were acquired by plaintiff, they were treated a single income-producing unit, a fact evident in the 1961 soil conservation plan that provides the backdrop for this action. In an attachment to that plan, plaintiff's father certified that both properties constituted a "farm enterprise," a characterization that appears to have remained accurate from then till today. *Compare Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1185-87 (Fed.Cir.2004), *cert. denied*, 545 U.S. 1104, 125 S.Ct. 2541, 162 L.Ed.2d

274 (2005) (production from multiple farms considered together as "parcel as a whole" where economically linked); *Apollo Fuel*, 381 F.3d at 1346 (two leases treated as parcel as a whole, even though purchased separately, where part of a single unified mining plan). Indeed, during the enforcement action, when plaintiff sought to exempt his fill activities as relating to farming, he convinced the district court that the Murphy and Homestead Farms were part of an integrated and on-going farm operation.[20] There is no indication that, prior to this lawsuit, he ever viewed matters otherwise. *See also Brace I*, 48 Fed.Cl. at 280 ("Plaintiff's alleged intentions was to use these parcels together in his farming operation.").

The meager evidence that plaintiff mustered on this point-that an unpaved road runs between the two properties, that the various fields have been used for different farming purposes (e.g., row crops, haying, pasture), and his self-serving trial testimony-amounts to little more than wishful thinking and does not begin to address, let alone sway, the factors that the courts have employed for identifying what constitutes a "parcel as a whole." While plaintiff undoubtedly desires to shrink the acreage at issue so as to magnify the impact of the regulation here, a

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[20] *See United States v. Brace*, Civil Action No. 90-229, at 12 (W.D.Pa. Dec. 16, 1993) ("This Court is persuaded and concludes that the subject site was during the entire period of time that ownership rested in the Brace family, an integral part of an established and on-going farm and ranching operations, and [Mr. Brace's] activities during the time frame of 1985-1987 did not bring a new area into the operation."); *see also Brace*, 41 F.3d at 125 (leaving this fact finding undisturbed).

legion of cases makes clear that a property holder cannot carve up his property simply to maximize the likelihood that a taking will be found. *See Tabb Lakes*, 10 F.3d at 802 ("Clearly, the quantum of land to be considered is not each *individual* lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, *ipso facto*, constitute a taking in every case where it exercises its statutory authority.") (emphasis in original); see also *Concrete Pipe*, 508 U.S. at 642-44, 113 S.Ct. 2264; *Jentgen v. United States*, 228 Ct.Cl. 527, 657 F.2d 1210, 1213 (1981); *Walcek*, 49 Fed.Cl. at 259. Here, the parcel as a whole plainly includes both farms at issue and the court's analysis will proceed upon that sound factual footing.

2. Categorical Taking

As recently noted by the Federal Circuit, "a regulatory taking becomes 'categorical,' and therefore, requires compensation only if the owner is deprived of all beneficial use of the 'parcel as a whole.' " *Norman*, 429 F.3d at 1091; *see also Tahoe-Sierra*, 535 U.S. at 330-31, 122 S.Ct. 1465. In the case *sub judice*, plaintiff was able to frame even a loosely colorable categorical taking claim only by treating the Murphy Farm as the "parcel as a whole." But, since the latter characterization is erroneous and because plaintiff did not contend-let alone prove-that the Homestead Farm was rendered valueless by the application of either the wetlands regulation or the Consent Decree, his categorical takings claim must fail.

3. Partial Taking-Application of Factors

The court next must determine whether the particular facts of this case, as anchored in the trial record, constitute a partial taking under the three-part *Penn Central* test.

i. Economic impact.

The first criterion-the economic impact of the regulation-is "intended to ensure that not every restraint imposed by government to adjust the competing demands of private owners would result in a takings claim." *Loveladies Harbor*, 28 F.3d at 1176; *see also Pennsylvania Coal*, 260 U.S. at 413, 43 S.Ct. 158 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."). "The cynosure of this factor," this court has noted, "is the change in the fair market value of the subject property caused by the regulatory imposition-in other words, the court must 'compare the value that has been taken from the property with the value that remains in the property.' " *Arctic King*, 59 Fed.Cl. at 374 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987)); *see also Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 2646; *Florida Rock*, 18 F.3d at 1567. "The economic analysis is often expressed in the form of a fraction, the numerator of which is the value of the subject property encumbered by regulation and the denominator of which is the value of the same property not so encumbered." *Walcek*, 49 Fed.Cl. at 258; *see also Florida Rock*, 18 F.3d at 1567; *Arctic King*, 59 Fed.Cl. at 374; *Brace II*, 51 Fed.Cl. at 653.

Both parties agree that for takings purposes, a property owner is entitled to have the fair market value be based upon the "highest and best use" of the property. *See, e.g., Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934). "Highest and best use" has been defined as " '[t]he reasonably probable and legal use of [property], which is physically possible, appropriately supported, financially feasible, and that results in the highest value,' " including those uses to which the property " 'may be readily converted.' " *Loveladies Harbor, Inc. v. United States*, 21 Cl.Ct. 153, 156 (1990) (quoting *United States v. Powelson*, 319 U.S. 266, 275, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943)); *see also Bassett, New Mexico, LLC v. United States*, 55 Fed.Cl. 63, 69 (2002). None of these cases, however, require the court to indulge blithely in "what if" fictions. As this court has stated, "the loss to be compensated for under the Takings Clause is not purely hypothetical, but must bear some grounding in reality, even in the case of a projected future use." *Arctic King*, 59 Fed.Cl. at 375. This is because "[t]he language of the Clause ... no more envisions a taking of 'private property' the plaintiff does not own, than it does the payment of just 'compensation' for the loss of value that plaintiff never had nor reasonably could realize." *Id.* (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999)).

Of course, in performing the foregoing analysis, it goes almost without saying that one has to value the ***correct*** parcel. Yet, plaintiff's expert did not. Instead of valuing the entire 134 acre-parcel

that included both farms, Mr. Lignelli valued only the smaller Murphy Farm. Particularly since plaintiff knew defendant was prepared to argue that the relevant parcel included both farms, and especially given the state of the law and facts surrounding that issue, this approach was tantamount to betting heavy on a low pair in a game of high-stakes poker. Unfortunately for plaintiff, no miracle card appeared on the "river"-the court has rejected the notion that the Murphy Farm represents the parcel as a whole, leaving a sizeable hole in plaintiff's proof. Perhaps an alternative approach that included both farms was not employed to minimize costs or perhaps plaintiff felt that his case was not tenable if the larger parcel were considered, but the result, motivations aside, is that plaintiff has not shown the impact of the Consent Decree or the wetland regulation in diminishing the value of the true parcel as a whole. *Compare Norman v. U.S.*, 63 Fed.Cl. 231, 273 (2004) (finding expert appraisal unhelpful because it "did not address the economic impact of what the court has determined to be the relevant parcel"); *Arctic King*, 59 Fed.Cl. at 369 (warning of "apply [ing] the right test to the wrong corpus and yield[ing] seemingly valid, but ultimately misleading results"). Lest the court leave the impression that plaintiff properly valued even the Murphy Farm, a few additional observations are in order.

First, plaintiff did not remotely carry his burden of proving that the "highest and best" use of the Murphy Farm was as a large 125-lot subdivision, to be developed over a twelve-year period. Mr. Lignelli predicated the use of the land for this

purpose on interviews with real estate brokers and developers, and on census data what he viewed as indicating that Waterford Township was the fastest growing town in Erie County. But, the brokers or developers with whom he spoke remained nameless and the statistics he relied upon showed in absolute, rather than percentage, terms a very small growth in population (a net increase of approximately 500 individuals over the course of a decade). Of course, per centums do not move into houses, people do. And to fully liquidate the lots in the proposed subdivision-the largest development, by far, to ever be constructed in the area-most of the projected housing growth for the entire area would, for the life of the project, have to be absorbed at this single site. Paradoxically, Mr. Lignelli could not explain why, if such a development was so feasible and desirable, no one had already built it on the ample land available in the area. One possible explanation, which was highlighted by defendant's expert, is that the typical lot in the Waterford area is actually 5 to 10 acres, neither the .33 acres envisioned by the development plan, nor even the 1 acre per lot limitation in the current zoning of the parcel.

The latter fact hints at a deeper problem. In assessing the feasibility of the project, Mr. Lignelli did not determine whether needed approvals-among them, not only the zoning changes allowing for much smaller lots, but also design, sewage, environmental, utility and road permits and approvals-could be obtained from the half dozen or more Federal, state and local authorities with sometimes interlocking jurisdiction over various aspects of the property. Rather, he simply assumed that those permissions

would be forthcoming based solely on oral representations he received from Mr. Hofius. Because Mr. Hofius did not testify, the court is ill-positioned to analyze the weight that should be afforded his opinions, assumptions or factual premises. Substantially undercutting that weight, Mr. Lignelli admitted that Mr. Hofius made only the most general of statements to him-merely indicating that the approvals were "more likely than not"-leaving Mr. Lignelli unsure whether Mr. Hofius even had included all the approvals required.[21] Mr. Lignelli also assumed, based only upon

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[21] Asked how he was able to "conclude that it was reasonably probable that a 125-lot subdivision could be constructed on the Murphy farm tract?," Mr. Lignelli tellingly explained-

> Well, again, it goes back to the hypothetical condition that if it can be built, it is feasible. Again, that's one of the tests of highest and best use. It's assumed that it's legally permissible. Since we're in 2004 appraising site as of 1996 it was unknown at that time whether it could or could not because again, it's a conceptual subdivision as opposed to a proposed subdivision. If it were proposed, all the regulatory requirements would have been met by the time the appraisal would be ordered or engaged. Again, typically an appraiser is involved after the requisite approvals have been granted and the appraiser is often engaged by a lender or bank who is putting forth a development loan. So there's no need to hire an appraiser until and unless all of the compliance issues have been arranged.

Mr. Lignelli indicated that he wanted to obtain more information from Waterford Township, but was barred from doing so by Mr. Brace.

representations made by Mr. Brace, that well water would be available for the entire subdivision at a nominal cost. Because the court finds Mr. Lignelli's various assumptions unproven and suspect, it concludes that the use of Murphy Farm as a large-scale housing development was a fictional litigation construct that was neither legally permissible nor financially feasible. *See Moore v. United States*, 61 Fed.Cl. 73, 78 (2004) (rejecting appraisal value that did not adequately account for zoning restrictions).

Second, assuming *arguendo* that the "highest and best" use of the Murphy Farm was as a subdivision, there are serious deficiencies in Mr. Lignelli's use of the discounted cash flow method to value the land.[22] On the one hand, Mr. Lignelli overstated the revenue likely to be produced from such a hypothetical subdivision. For example, he assumed, with no factual support and contrary to evidence produced by defendant, that permissions could be obtained to develop the almost 13 acres of the 58-acre Murphy Farm tract that were within the 100-year flood plain adjacent to the Elk Creek. Indeed some of the lots on the plan that Mr. Lignelli used appear to be located directly on the creek itself and at least one of the parcels includes within its contours a preexisting gas well. Nor did the plans

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[22] A recent decision of this court described well the methodology that Mr. Lignelli essentially employed: "Under the subdivision development method: All direct and indirect costs [of development] and entrepreneurial profit are deducted from an estimate of the anticipated gross sales price of the finished lots; the resultant net sales proceeds are then discounted to present value at a market-derived rate over the development absorption period to indicate the raw value of land." *Norman*, 63 Fed.Cl. at 271 (internal citations omitted).

Mr. Lignelli obtained from others make any allowance for the lots that would be lost in installing water and sewer treatment plants for the subdivision-Mr. Lignelli instead assumed that these facilities could be located, without cost, on adjoining property. This was not the only instance in which Mr. Lignelli donned rose-colored glasses in assessing the costs associated with developing the subdivision. Perhaps most significantly, he assumed that the hydric soils underlying the entire Murphy Farm were suitable for building and did not include any specific charge for what the records suggests would be the significant costs associated with preparing the wetlands for use as housing lots.[23] Testimony by defendant's expert showed that this assumption was erroneous. And, Mr. Lignelli assumed that Waterford Township would pay the cost of paving South Hill Road, again without any support in the record. Of course, the impact of Mr. Lignelli's overstating the income from the property and understating the expenses of development was to overstate the value of the property.

Third, as alluded to above, Mr. Lignelli relied heavily on representations made by parties that did not testify at the trial. Certainly, under the Rule 703 of the Federal Rules of Evidence, a testifying expert

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[23] During trial, whenever Mr. Lignelli was confronted with a cost that he had not considered, he asserted that it was covered by the $60,000 estimate that Mr. Hofius had provided for miscellaneous development costs. While there was no indication as to what was included in this figure, with each salvific reference thereto, it became more and more obvious that Mr. Lignelli had ignored expenses that might have individually, let alone collectively, exceeded this catchall figure.

may rely upon "facts or data" made known to the expert before the hearing and even may rely upon opinions, if reasonably relied upon by experts in the particular field. See Advisory Committee Note to Rule 703. However, the *ipse dixit* of that reliance does not make those facts, data or opinions true, particularly where, as here, they are derived largely from hearsay. *See* Fed.R.Evid. 802. Rule 703 "was not intended to abolish the hearsay rule and to allow a witness, under the guise of giving expert testimony, to in effect become the mouthpiece of the witnesses on whose statements or opinions the expert purports to base his opinion." *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F.Supp.2d 794, 808 (N.D.Ill.2005).[24] In short, Mr. Lignelli's report did not "automatically become proof of the facts underlying [his] expert [ ] opinion," *Logan v. City of Pullman*, 392 F.Supp.2d 1246, 1254 (E.D.Wash.2005), requiring plaintiff to otherwise demonstrate that the critical factual assertions upon which he proceeded were preponderantly true, particularly as they related to the feasibility of developing the Murphy Farm into a subdivision. *See Ambrosini v. Labarraque*, 101 F.3d 129, 135-36 (D.C.Cir.1996); *Mid-State Fertilizer Co. v. Exchange Nat. Bank of Chicago*, 877 F.2d 1333, 1338 (7th Cir.1989); Fox *v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1356 (5th Cir.1983). While this is not to suggest that plaintiff was obliged to corroborate

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[24] *See also Dura Automotive Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir.2002); *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728-29 (6th Cir.1994); *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 731-34 (10th Cir.1993); *Paddack v. Dave Christensen, Inc.*, 745 F.2d 1254, 1262 (9th Cir.1984).

every single fact upon which his expert relied, it remains that, in presenting an abbreviated case, plaintiff largely skipped over this vital verification step.

In short, the record reveals that plaintiff provided little, if any, corroboration of the key assertions upon which Mr. Lignelli proceeded. Many of those assumptions involved the planning and costs of the subdivision and came either from Mr. Hofius or from letters from other nontestifying individuals that provided only the most conclusory of information. The situation thus confronted by the court was very similar to one faced by the Seventh Circuit in *Matter of James Wilson Assocs.*, 965 F.2d 160 (7th Cir.1992). There, the Seventh Circuit observed-

> The issue was the state of the building, and the expert who had evaluated that state-the consulting engineer-was the one who should have testified. The architect could use what the engineer told him to offer an opinion within the architect's domain of expertise, but he could not testify for the purpose of vouching for the truth of what the engineer had told him-of becoming in short the engineer's spokesman.... [I]t is improper to use an expert witness as a screen against cross-examination.

Id. at 173. In the case *sub judice*, Mr. Hofius played the role of the consulting engineer, *i.e.*, "the one who should have testified." *Id.; see also TK-7 Corp.*, 993 F.2d at 732 ("[t]he fact that [the expert] relied upon

the report in performing his calculation of lost profits does not relieve the plaintiffs from their burden of proving the underlying assumptions contained in the report"). As in these cases, Mr. Lignelli did not really determine the feasibility of using the property as a subdivision, but merely valued the property based on the assumption that such a use was feasible. In terms of weight, then, Mr. Lignelli's ultimate opinion of value is virtually devoid of factual moorings, depriving it of virtually any evidentiary value. *See Guillory v. Domtar Indus. Inc.*, 95 F.3d 1320, 1331 (5th Cir.1996) ("Expert evidence based on a fictitious set of facts is just as unreliable as evidence based upon no research at all."). Indeed, Mr. Lignelli boldly testified that if any of his critical assumptions were not borne out, his conclusions would be "null and void," a statement that proved prophetic.

Hence, even if plaintiff were correct about the contours of the parcel as a whole here, his proof on this factor would still be grossly deficient. So where does this leave us? Based upon the record, the court believes that the calculations of defendant's appraiser, Mr. Silver, were more rigorous, supported, transparent and, ultimately, more accurate. In particular, Mr. Silver provided significantly greater detail regarding the sources of his information, as well as two volumes of background materials in support his findings-the wide majority of which material plaintiff did not bother to challenge, and all of which he did not rebut. Mr. Silver found that the highest and best use of the property was as farmland and that the value of the property unrestricted by the Consent Decree or application of the CWA was $355,000. In reaching this conclusion, he employed a

comparable sales approach that relied on various sales of farm property, some of which incorporated "mucklands" comparable to the wetlands at issue here. Again, plaintiff showed flaws neither in Mr. Silver's selection of comparables nor in the adjustments he made to derive the "before" value of the property.

Using a similar methodology, Mr. Silver concluded that the "after" value of the parcel as a whole was $300,000. In this regard, he based his value, in part, on the view that the upland portions of the Murphy Farm could continue to be farmed. Claims to the contrary, in fact, were rebutted by evidence that, following the Consent Decree, Mr. Brace himself had conducted farming on the upland portions. To be sure, Mr. Lignelli initially testified that the value of the Murphy Farm with the Consent Decree in place was "scant," asserting that the presence of that decree somehow tainted the entire property.[25] But, he later admitted that the upland portions of the property could be used a single homesite that would overlook the wetlands, giving it a value of $140,000. Given that Mr. Lignelli did not value the larger Homestead Farm at all, the figure of $140,000 for the "after" value of the Murphy Farm compares favorably with Mr. Silver's estimate of the

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[25] Mr. Lignelli's notion that the uplands portion of the property had scant value was based upon his view that the Consent Decree made it unlikely that anyone could put the uplands to profitable use. In this regard, while Mr. Lignelli was more than willing to assume that every approval would be obtained necessary to allow for the development of the subdivision, he was unwilling to assume that inquiries to the EPA regarding the Consent Decree would clarify the types of activities that would be allowed on the uplands.

"after" value of the entire property. Accordingly, the court finds that the "after" value of the property was $300,000.

As such, the court finds that the numerator of the takings equation is equal to $300,000 and the denominator thereof is $355,000. Consequently, the court finds that the application of the Consent Decree and the corresponding regulation of the property under the CWA resulted in a diminution in value of approximately 14 percent.

ii. The extent to which the regulation has interfered with reasonable investment-backed expectations.

The second factor in *Penn Central*-the interference with reasonable investment-backed expectations-is a "way of limiting takings recoveries to owners who [can] demonstrate ... reliance on a state of affairs that did not include the challenged regulatory regime." *Loveladies Harbor*, 28 F.3d at 1177; see also *Creppel*, 41 F.3d at 632. Although this factor is often couched in terms of the owner's expectations at the time the property is purchased, see *Loveladies Harbor*, 28 F.3d at 1177, various cases hold that the inquiry focuses on various investment decisions, including those made after the property was initially purchased. *See, e.g., Good*, 189 F.3d at 1361-62; *Deltona Corp.*, 657 F.2d at 1193; *Seldovia Native Ass'n, Inc. v. United States*, 35 Fed.Cl. 761,

773-74 (1996).[26] So framed, this factor encompasses two related elements: first, the extent of the plaintiff's investment in reliance on the regulatory scheme in place at the time of his investment decisions; and second, the extent to which the further regulation of its property was foreseeable. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984); see also *Appolo Fuels*, 381 F.3d at 1349; *Walcek*, 49 Fed.Cl. at 268. These expectations must be reasonable-"[a] 'reasonable investment backed expectation' must be more than a 'unilateral expectation or an abstract need.' " *Ruckelshaus*, 467 U.S. at 1005-06, 104 S.Ct. 2862 (quoting *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980)); *see also Norman*, 429 F.3d at

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[26] As noted by Professor Eagle, in his treatise on regulatory takings-

> The phrase "investment-backed expectations" had been used first in Professor Frank Michelman's seminal article and borrowed for Justice Brennan's *Penn Central* opinion with no reference other than to the intent, or expectation, of the landowner at the time he made his "investment." *Good* suggests that subsequent events, including the alacrity with which the owner pursues his plans, the extent the owner has to battle administrative delay in a multitude of agencies, and the enactment of subsequent statutes and the promulgation of regulations, all play a role in "reasonable investment-backed expectations" analysis.

Steven J. Eagle, Regulatory Takings 931 (2001) (citing, *inter alia*, Frank I. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 Harv. L.Rev. 1165 (1967)).

1092; *Cienega Gardens v. United States*, 331 F.3d 1319, 1345-46 (Fed.Cir.2003); *Good*, 189 F.3d at 1360.

Plaintiff's evidence on this point is somewhat more compelling. To be sure, the relevant provisions of the CWA were enacted in 1972, several years before plaintiff acquired the property. And, at trial, Mr. Brace admitted that, at the time of his purchase, he was aware of the CWA and that there were some form of wetlands on the property. Nonetheless, as this court explained in *Walcek*-

> even after the passage of the Clean Water Act, the Corps, at first, adopted a narrow definition of the "navigable waters" subject to the Act, essentially defining them as coextensive with the "navigable waters" subject to regulation under Section 10 of the Rivers and Harbors Act. *See* 39 Fed.Reg. 12,115, 12,119 (April 3, 1974). It was not until 1975, following a district court decision invalidating the earlier regulation and ordering the issuance of broader regulations, that the Corps finally issued an interim final regulation redefining "the waters of the United States" to include all freshwater wetlands that were located near navigable waters. *See* 40 Fed.Reg. 31,324 (July 25, 1975); 33 C.F.R. § 209.120(d)(2)(h) (1976). And it was not until almost ten years later, in 1985, that the Supreme Court finally resolved that these more expansive regulations

> represented a valid and reasonable construction of the statute. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 130-39, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985).

Walcek, 49 Fed.Cl. at 268-69 (footnote and citations omitted).[27] Accordingly, it was not until a few months before Mr. Brace purchased the property that the Corps itself reversed its initial interpretation of the CWA and not until nearly a decade after that purchase that the Supreme Court confirmed that the expanded view of the regulations was correct.

> In the court's view, it does not seem reasonable to impute to plaintiff an interpretation of the CWA that clearly was in flux at the time the land in question was purchased. *See Walcek*, 49 Fed.Cl. at 269 (reaching the same conclusion as to an individual who had purchased property in 1971, stating that "[w]hile the *Penn Central* analysis anticipates reasonably foreseeable developments, it does not require a property owner to be clairvoyant"); *see also Deltona*, 657 F.2d at 1191 (suggesting that the events described above had "radically transformed" the regulatory regime, working an

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[27] This court described these developments in its earlier opinion in this case. *See Brace*, 48 Fed.Cl. at 277-78; *see also* Flint B. Ogle, "The Ongoing Struggle Between Private Property Rights and Wetlands Regulation: Recent Developments and Proposed Solutions," 64 U. Colo. L.Rev. 573, 575-76 (1993).

"unforeseen change in the law").[28] Application of the wetlands regulatory regime to plaintiff's property particularly was not foreseeable given the ambiguities concerning whether the CWA barred certain types of farming activities. The record, of course, demonstrates that, for decades, the USDA encouraged plaintiff and his father to increase the agricultural capacity of their land and, in so doing, applied both definitions of wetlands, as well as the scope of the CWA, that were far narrower than what was ultimately determined to be the case. To be sure, the agencies involved here never specifically provided either guidance or financing targeted at draining the 30 acres of wetlands at issue here. But, even after the passage of the CWA and the issuance of the 1975 regulations, those same agencies continued to provide guidance and financing to drain other portions of plaintiff's property, undoubtedly leaving the impression that the requirements of the CWA were more relaxed and flexible when it came to farming. And that impression actually reflected what

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[28] Defendant essentially operates on the notion that "the law is what the law is" and that the history of the regulations is thus irrelevant. But, that argument seemingly ignores not only the foreseeability prong of this factor, but also the realities of the regulatory process and the marketplace. As to the latter, while one might reasonably assume that, after the passage of the CWA, a person could have acquired the property at somewhat of a discount, there is no indication that discount would have fully recognized the potential application of the CWA at the time Mr. Brace acquired the property, given the flux in the law. This is not to say that a person can harbor reasonable investment-backed expectations regarding the use of his property until it is actually identified as being subject to the CWA, but only to say that such expectations may, to a certain extent, be retained until the law itself is settled.

the local agency believed. Thus, Mr. Burawa, the former County Executive for the ASCS, testified that, at least into the 1980s, the local branch of his agency was of the view that the CWA did not prevent farmers from draining their lands to promote agriculture.

Of course, the actions of the USDA only reinforced plaintiff's reasonable investment-backed expectation to the extent that he sought to farm the property. They could not-and did not-impact any expectation of using the property as a housing subdivision. Nonetheless, while Mr. Brace's knowledge of the passage of the CWA diminishes somewhat the strength of his argument regarding his investment-backed expectations, the court finds in his favor on this second of the *Penn Central* factors.[29]

iii. The character of the governmental action.

The last criterion-the character of the government action-requires the court to consider "the purpose and importance of the public interest underlying [the] regulatory imposition, ... obligating

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[29] The court is aware that in his earlier opinion in this case, Judge Tidwell found that this factor weighed in favor of defendant. *Brace I*, 48 Fed.Cl. at 283-84. While the court agrees with many of the points that Judge Tidwell believed weighed against plaintiff, it believes that, based upon the evidence received at trial, particularly that regarding the USDA's practices, law of the case considerations do not prevent it from finding that this factor, on balance, now weighs toward plaintiff. *See Franconia Assocs. v. United States*, 61 Fed.Cl. 718, 733-34 (2004)

the court to 'inquire into the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented.' " *Maritrans, Inc. v. United States*, 342 F.3d 1344, 1356 (Fed.Cir.2003) (quoting *Creppel*, 41 F.3d at 631); *see also Lucas*, 505 U.S. at 1029, 112 S.Ct. 2886 (no taking if the limitation "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership"); *Forest Props.*, 177 F.3d at 1366; *Loveladies Harbor*, 28 F.3d at 1179. "[W]hile most burdens consequent upon government action undertaken in the public interest must be borne by individual landowners as concomitants of the advantage of living and doing business in a civilized community," the Supreme Court has stated, "some are so substantial and unforeseeable, and can so easily be identified and redistributed, that justice and fairness require that they be borne by the public as a whole." *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 14, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984) (citation omitted).[30] Burnishing this concept,

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[30] *See also United States v. Locke*, 471 U.S. 84, 106 n. 15, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985); *Maritrans*, 342 F.3d at 1357; *Cienega Gardens*, 331 F.3d at 1338; *Am. Pelagic Fishing Co. v. United States*, 49 Fed.Cl. 36, 51 (2001), *rev'd on other grounds*, 379 F.3d 1363 (Fed.Cir.2004), *cert. denied*, 545 U.S. 1104, 125 S.Ct. 2963, 162 L.Ed.2d 887 (2005). In *Maritrans*, the Federal Circuit determined that the nature of the government's action in passing legislation that would require oil tankers to have double hulls, in the wake of the Exxon Valdez oil spill and as an attempt to limit such spills in the future, was not such that it imposed disproportionately a burden on the plaintiff. The legislation applied uniformly across the oil transport industry, "thereby spreading the burden imposed by the statute over the entire industry" and, therefore, did not rise to a taking

the Supreme Court, in *Eastern Enterprises*, suggested that in considering whether, under this factor, a regulation "implicates [the] fundamental principles of fairness underlying the Takings Clause," two other indicia are relevant: (i) the extent to which the action is retroactive; and (ii) whether the action targets a particular individual. *Eastern Enterprises*, 524 U.S. at 537, 118 S.Ct. 2131; *see also Am. Pelagic I*, 49 Fed.Cl. at 50.

In the case *sub judice*, there is obviously nothing to suggest that farming constitutes a nuisance, so that application of the CWA could be viewed as effectuating a limitation inherent in the use of the land. *Cf. Appolo Fuels*, 381 F.3d at 1347 (indicating that defendant "may defend against liability by claiming that the regulated activity constituted a state law nuisance without regard to the other *Penn Central* factors"). At the same time, the existence of the wetland regulations in question, as well as their application to the farms, indisputably serve an important public purpose-one which benefits plaintiff as members of the public at large. *See, e.g., Riverside Bayview Homes, Inc.*, 474 U.S. at 131-35, 106 S.Ct. 455; *see also Rapanos v. United States*, --- U.S. ----, ----, 126 S.Ct. 2208, 2240, 165 L.Ed.2d 159 (2006) (Kennedy, J., concurring). Thus, as was said in an earlier Federal Circuit case, "[t]he importance of preserving the environment, the authority of state and federal governments to protect and preserve ecologically significant areas ... through appropriate regulatory mechanisms is not here being questioned." *Loveladies Harbor*, 28 F.3d at 1175. In

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of plaintiff's property. 342 F.3d at 1357.

sum, this court reaffirms its finding in *Brace I*, 48 Fed.Cl. at 278-79, that "the United States has a legitimate public welfare obligation to preserve our nation's wetlands" and "the government's actions in this case were well directed to that end."

Considering the factors more recently identified in *Eastern Enterprises*, the degree of retroactivity here is not extraordinary-even assuming *arguendo* that plaintiffs could not have reasonably anticipated the final resolution of the disputes concerning the scope of the CWA, it remains that the CWA and the initial regulations extending that statute to wetlands such as those at issue were extant at the time that Mr. Brace purchased the property. Further, the CWA and the wetlands regulations issued thereunder are generally applicable to all similarly situated property owners and can in no way be viewed as being directed at plaintiffs. *Cf. American Pelagic*, 49 Fed.Cl. at 50-51. Accordingly, while the absence of a nuisance certainly cuts in favor of a finding of a taking, other circumstances in this case ameliorate somewhat the impact of the third *Penn Central* factor in this regard.

iv. Redux.

The Supreme Court has observed that " *Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required." *Tahoe-Sierra*, 535 U.S. at 327 n. 23, 122 S.Ct. 1465 (quoting *Palazzolo*, 533 U.S at 633-34, 121 S.Ct. 2448 (O'Connor, J., concurring)); see *also Bass Enter. Prod. Co. v. United States*, 381

F.3d 1360, 1370 (Fed.Cir.2004); *Cane Tennessee, Inc. v. United States*, 57 Fed.Cl. 115, 122-23 (2003). Here, those guideposts provide mixed results, making this a closer case than some. In this regard, summarizing the results of its analysis, the court finds as follows:

Economic Impact. In *Lucas*, 505 U.S. at 1027-31, 112 S.Ct. 2886, the Supreme Court held that a diminution of 93.7 percent did not constitute a categorical takings. While the Court in Lucas suggested that such a diminution might also not be indicative of a regulatory taking under the economic analysis factor under *Penn Central*, it refrained from drawing a bright line. Indeed, while courts have struggled with the dichotomy between compensable "partial takings" and noncompensable "mere diminutions," searching for a threshold beyond which diminution would be indicative of a taking, several Supreme Court decisions suggest that diminutions in value approaching 85 to 90 percent do not necessarily dictate the existence of a taking.[31] This court likewise has generally relied on diminutions well in excess of 85 percent before finding a

[31] *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (no taking despite 75 percent diminution); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (no taking despite 87.5 percent diminution).

regulatory taking.[32] Conversely, the Supreme Court, the Federal Circuit and this court all have held that percentages of value losses considerably higher than that found here are not indicative of a taking.[33]

"While this court is no better postured than others to snap a line dividing compensable from noncompensable exercises of government regulatory power," *Arctic King Fisheries*, 59 Fed.Cl. at 385, in the court's view, one cannot remotely say that a diminution on the order of 14 percent has the effect of a taking. As was recognized by the Supreme Court, "[o]nly when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the [property] in question can it be said that a taking has occurred." *Riverside Bayview Homes, Inc.*, 474

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[32] *See Loveladies Harbor v. United States*, 21 Cl.Ct. 153, 160 (1990) (taking-99 percent diminution), *aff'd*, 28 F.3d 1171 (Fed.Cir.1994); *Bowles v. United States*, 31 Fed.Cl. 37, 48-49 (1994) (taking-92-100 percent diminution); *Formanek v. United States*, 26 Cl.Ct. 332, 340 (1992) (taking-88 percent diminution); *see also 1902 Atl. Ltd. v. United States*, 26 Cl.Ct. 575, 579 (1992) (88 percent loss satisfies "economic impact" factor, although no taking found); *cf. Florida Rock Indus. Inc. v. United States*, 45 Fed.Cl. 21, 40-41 (1999).

[33] *See Concrete Pipe*, 508 U.S. at 645, 113 S.Ct. 2264 (no taking-46 percent diminution); *Walcek*, 303 F.3d at 1355-56 (no taking-60 percent diminution); *Jentgen v. United States*, 657 F.2d at 1213 (no taking-50 percent diminution); *Arctic King*, 59 Fed.Cl. at 384-85 (no taking-50 percent diminution); *Cane Tennessee*, 57 Fed.Cl. at 129 (no taking-49.6 percent diminution); *Ciampitti*, 22 Cl.Ct. at 320 (no taking-25 percent diminution); *see also Maritrans*, 342 F.3d at 1344 (no taking-13.1 percent diminution); *see generally* David F. Coursen, "The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit," 29 Envtl. L. 821, 848-51 (1999) (discussing some of these cases).

U.S. at 127, 106 S.Ct. 455. Such is certainly not the case here. Indeed, based on the case law, this court would have concluded that the diminution of the value of the parcel as a whole was not indicative of a taking even if plaintiff had been successful in demonstrating that the Murphy Farm had scant value. And, again, in many ways, the foregoing observations considerably overstate plaintiff's case as it remains that plaintiff valued the wrong parcel, that is, only the Murphy Farm. Accordingly, this factor weighs heavily in defendant's favor.[34]

Reasonable Investment-Backed Expectations. Second, the court finds that, at the time he purchased the property, plaintiff had a reasonable investment-backed expectation that he could use the wetlands portion of his property for purposes other than pasturing. Those expectations were consistent with the flux that was occurring in the state of the law, as well as indications that

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[34] Also supporting this conclusion is the fact that the evidence suggests that, even with the Consent Decree, Mr. Brace could recoup his investment in the twin farms (at least plaintiff did not show otherwise). The Federal Circuit in *Maritrans* observed that "the owner's opportunity to recoup its investment or better, subject to the regulation, cannot be ignored." 342 F.3d at 1354 (citing *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1363 (Fed.Cir.2001), *cert. denied*, 536 U.S. 958, 122 S.Ct. 2660, 153 L.Ed.2d 835 (2002)); *see also Florida Rock*, 45 Fed.Cl. at 38 ("In determining the severity of the economic impact of the permit denial, the court must also take into account whether [the plaintiff] was able to recoup its investment subject to the regulation.") (citing *Florida Rock*, 18 F.3d at 1567). As this court noted in *Cane Tennessee*, "if a party were able to recoup its investment after the government action, it is less likely that a taking has occurred." 57 Fed.Cl. at 124 (citing *Walcek*, 303 F.3d at 1357).

plaintiff received from the local officials of the ASCS. However, the impact of this finding is diminished somewhat by the fact that the CWA was passed prior to plaintiff's acquisition of the property. Plaintiff was aware of this development and of the presence of wetlands on the Murphy Farm. Had this been a sale between unrelated parties, rather than an intrafamily transaction, the value of the property undoubtedly would have been discounted somewhat to take into account the possibility that the CWA could limit the uses of those wetlands.

Nature of the Governmental Action. Third, and finally, the court finds that the farming of the property would not constitute a nuisance under state law, tending to support the conclusion that a taking occurred here. The impact of this factor, however, is significantly ameliorated by the fact that the imposition of the wetlands regulations here served important public purposes, was not severely retroactively, and was not targeted on plaintiff.

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On this record, the court concludes that the application of the wetlands regulations through the Consent Decree and otherwise has not effectuated a regulatory taking of plaintiff's property. Rather, guided by the three-tiered *Penn Central* analysis, the court finds that the limitations associated with the Consent Decree and the underlying requirements of the CWA resulted only in a noncompensable diminution in the value of the parcel as a whole and allow plaintiff to realize to significant degree his true reasonable investment-backed expectations. In short, the situation presented by the record simply is not

"functionally comparable to government appropriation or invasion of private property." *Lingle*, 544 U.S. at 543, 125 S.Ct. 2074.

B. Physical Taking

Plaintiff also alleges that a physical taking of his property has occurred. In this regard, he asserts the Consent Decree effectuated a physical occupation of his property by requiring: (i) restoration of the wetlands; (ii) the installation of a check dam that has caused his property to flood; (iii) him to provide access to federal officials in order to inspect the restoration work; and (iv) recordation of the Consent Decree, creating, in plaintiff's view, a "conservation easement" over 30 acres of plaintiff's land.

A physical taking occurs "when the government itself occupies the property or 'requires the landowner to submit to physical occupation of its land.' " *Forest Props.*, 177 F.3d at 1364 (quoting *Yee*, 503 U.S. at 527, 112 S.Ct. 1522); *see also Stearns Co. v. United States*, 396 F.3d 1354, 1358 (Fed.Cir.2005), *cert. denied*, --- U.S. ----, 126 S.Ct. 385, 163 L.Ed.2d 170 (2005); *Tuthill Ranch, Inc. v. United States*, 381 F.3d 1132, 1135 (Fed.Cir.2004). Concepts such as "parcel of the whole" are meaningless in this context. Rather, it is well established that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner ..., regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Brown v. Legal Found. of Washington*, 538 U.S. 216, 233, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115,

71 S.Ct. 670, 95 L.Ed. 809 (1951)); *see also Loretto*, 458 U.S. at 441, 102 S.Ct. 3164; *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1352 (Fed.Cir.2003). Indeed, as plaintiff notes, a taking results "even if the Government physically invades only an easement in property." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); *see also Ridge Line*, 346 F.3d at 1352.

1. Did the Consent Decree effectuate a physical takings?

Of course, a threshold question here is whether a "consent" decree can give rise to a taking. Generally speaking, court orders have never been viewed themselves as independently*359 giving rise to a taking. As Justice Brandeis said famously in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), "the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decision on which a party relied, does not give rise to a [takings] claim under the Fourteenth Amendment...." This rule has been applied to both state and federal judgments and orders. *See, e.g., Elks Nat. Found. v. Weber*, 942 F.2d 1480, 1485 (9th Cir.1991), *cert. denied*, 505 U.S. 1206, 112 S.Ct. 2995, 120 L.Ed.2d 872 (1992); *Reynolds v. Georgia*,

640 F.2d 702, 703 (5th Cir.1981).[35] At least at one level of abstraction, these decisions proceed from the theory that courts do not create or change the law, but merely interpret and administer the Constitution, the law as declared by the legislature, and the common law. *See Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 365, 53 S.Ct. 145, 77 L.Ed. 360 (1932) (Cardozo, J.)

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[35] Research reveals only one case holding that a judicial decision that overturned prior case law could be considered a taking, *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir.1985). That case, however, was subsequently vacated by the Supreme Court on other grounds, 477 U.S. 902, 902, 106 S.Ct. 3269, 91 L.Ed.2d 560 (1986), and eventually dismissed as unripe, 887 F.2d 215, 219 (9th Cir.1989). A decision of this court has suggested, albeit in dicta, that a judicial action may give rise to a taking, *see Ultimate Sportsbar v. United States*, 48 Fed.Cl. 540, 550 (2001)(Smith, C.J.), relying in that regard on Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 296-97, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967) and a few law review articles. But, this opinion did not discuss any of the considerable precedent to the contrary. Cf. W. David Sarratt, "Judicial Takings and the Course Pursued," 90 Va. L.Rev. 1487, 1510 (2004) (noting that Justice Stewart's concurrence "has never been followed by a majority of the Court, and the Court has since declined offers to take up the issue again"); J. Nicholas Bunch, "Takings, Judicial Takings, and Patent Law," 83 Tex. L.Rev. 1747, 1754 (2005) ("Although the argument [in favor of judicial takings] has been raised in the courts, it has been rejected time and time again."). While *Muhlker v. N.Y. and Harlem Railroad Co.*, 197 U.S. 544, 25 S.Ct. 522, 49 L.Ed. 872 (1905), is sometimes cited as judicial takings case, in fact, the Supreme Court there set aside a state court judgment under the Contracts Clause of the Constitution. *See* Sarratt, *supra*, at 1504 ("While Justice McKenna's plurality opinion reversing the Court of Appeals suggested that states could not skirt the compensation requirement through their courts, he ultimately grounded his decision in the Contracts Clause rather than the Takings Clause.").

(indicating that even a decision overruling a prior precedent does not effectuate a change in the law); *Brinkerhoff-Faris, 281 U.S.* at 680, 681 n. 8, 50 S.Ct. 451; *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450-55, 44 S.Ct. 197, 68 L.Ed. 382 (1924); *see also Patterson v. Colorado*, 205 U.S. 454, 461, 27 S.Ct. 556, 51 L.Ed. 879 (1907) (there is "no constitutional right to have all general propositions of law once adopted remain unchanged."). As such, "the constitutional obligation not to 'take' property does not fall equally on all branches." Roderick E. Watson, " The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings," 2001 Utah L.Rev. 379, 438 (2001). Indeed, were the court to accept plaintiff's syllogism, it would constantly be called upon by disappointed litigants to act as a super appellate tribunal reviewing the decisions of other courts to determine whether they represented substantial departures from prior decisional law. *See Vereda Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed.Cir.2001); *Reynolds*, 640 F.2d at 703 (rejecting claim that a decision of the Georgia Supreme Court effectuated a taking, noting that federal courts are not "designed to serve as additional appellate reviewers of state court judgments"); *see also Allustiarte v. United States*, 256 F.3d 1349, 1352 (Fed.Cir.), *cert. denied*, 534 U.S. 1042, 122 S.Ct. 619, 151 L.Ed.2d 541 (2001). Such an approach, fortunately, is untenable.

Even were judicial takings cognizable, it is hard to fathom how a consent decree could meet the requirements for a taking, among which is the

presence of a compelled acquiescence.[36] Such decrees are hybrids-part order, part contract-and obviously reflect the agreement of the parties, often to provisions that would be beyond the power of the court to impose without the parties' consent. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992) (noting that consent decrees are "in some respects contractual in nature"); *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 519, 522, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986) ("[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based that creates the obligations embodied in a consent decree."). In other situations involving agreements, this court has held that the compulsion or exaction element that characterizes a physical taking is missing,[37] and it would appear that the absence of the same element

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[36] *See F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 253, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987) ("the element of required acquiescence is at the heart of the concept of occupation"); *Ruckelshaus*, 467 U.S. at 1007-08, 104 S.Ct. 2862 ("a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking"); *Norman*, 429 F.3d at 1089 ("voluntary transfer" not "a proper basis on which to premise a takings claim").

[37] *See BMR Gold Corp. v. United States*, 41 Fed.Cl. 277, 283 (1998) (no taking where plaintiff granted military consent to cross its land); *Turntable Fishery & Moorage Corp. v. United States*, 52 Fed.Cl. 256, 263 (2002) (no taking where plaintiff voluntary transferred common facilities to government in exchange for continued use of marina); *Scogin v. United States*, 33 Fed.Cl. 285, 291 (1995) (although the right to exclude others from one's property is a compensable Fifth Amendment interest, "a property owner relinquishes the right to exclude when the owner consents to the entry, use, and occupation of the subject property").

vitiates any notion that a per se or physical taking occurred here. *See Johnson v. United States*, 49 Fed.Cl. 648, 654 (2001), *aff'd*, 317 F.3d 1331 (Fed.Cir.2003) ("Johnson's corporation 'consented' to the subject judgment and agreed to come into compliance with the law. In such circumstances, he cannot claim that the underlying action was a taking."); *see also SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 91 (2d Cir.2002) (no takings claim where voluntary action led to court order).

Despite the Supreme Court's pronouncement that "the voluntary nature of a consent decree is its most fundamental characteristic," *Local No. 93*, 478 U.S. at 521-22, 106 S.Ct. 3063, plaintiff intimates that the Consent Decree was not voluntary-that it was signed under the pressure created by the Third Circuit's reversal of the favorable (to plaintiff) decision rendered by the district court. But, this view is belied by the relative narrowness of the Third Circuit's ruling, which only dealt with the applicability of the CWA and did not dictate many of the provisions found in the Consent Decree, including those dealing with the appropriateness of assessing civil penalties. *See Brace*, 41 F.3d at 129. Apart from Mr. Brace's self-serving statements, there is neither evidence of a lack of consent generally nor, particularly, as to the decree provisions of which he most vociferously complains, i.e., the restoration plan, the creation of the check dam, and allowing the government to monitor the remediation efforts. Rather, it would appear that plaintiff agreed to these various provisions at least in part to avoid the imposition of more significant civil penalties under 33 U.S.C. § 1319(d), which during

the period in question could range as high $25,000 per day for each violation. While the EPA initially sought a fine of $125,000, the Consent Decree provided for a total civil penalty of only $10,000. Absent some evidence of compulsion, the court, therefore, must find that, like any other consent decree, the decree at issue led to a voluntary acquiescence and thus did not give rise to a physical taking. A contrary ruling, indeed, would threaten not only the validity of the Consent Decree here, but the entire concept of consent decrees, as it would hold open the possibility that a private party, after negotiating a settlement, could retain its rights under such agreement while challenging, as takings, the less desirable provisions thereof. *See John R. Sand & Gravel Co. v. United States*, 59 Fed.Cl. 645, 656 (2004).

Even if the Consent Decree could be viewed as potentially effectuating a taking, either as itself compelling acquiescence or simply as manifesting the binding requirements of the CWA, there is still no basis for concluding that it effectuated a physical takings. Rather, as the Federal Circuit explained in *Forest Properties* actions depriving plaintiff from using the wetlands as farmlands must be analyzed as a regulatory taking-

> A physical taking of land occurs when the government itself occupies the property or ' requires the landowner to submit to physical occupation of its land,' *Yee v. City of Escondido*, 503 U.S. 519, 527, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992), whether by the government or a third party.... In a regulatory

> taking, the government prevents the landowner from making a particular use of the property that would be permissible.

177 F.3d at 1364 (emphasis in original) (internal citations omitted); *see also Tahoe-Sierra*, 535 U.S. at 324, 122 S.Ct. 1465 (land use regulations do not fall under the ambit of a "classic" taking where the government directly appropriates private property for its own use, but rather involves a regulatory interference with property rights); *Tuthill Ranch*, 381 F.3d at 1137 ("Principal invasions short of an occupation and regulations that merely restrict the use of property may qualify as regulatory takings but not as a physical takings."). This rule has been applied to use limitations similar to those effectuated by the Consent Decree here.[38] In such cases, courts have made short shrift of attempts to recharacterize regulatory takings as physical takings, rejecting fanciful efforts to invoke the more strict regime associated with the latter doctrine. *See generally, Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646 ("A 'taking' may be more readily found when the interference with property can only be characterized as a physical invasion by the government.").

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[38] *See, e.g., Stearns Co.*, 396 F.3d at 1357 (failure to allow mining under the Surface Mining Control and Reclamation Act did not effectuate a physical taking of mineral rights); *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1352-53 (Fed.Cir.2002) (no physical taking where property owner prohibited from logging); *Forest Prop.*, 177 F.3d at 1364 (no physical taking where denial of permit prevented excavation and filling of lake bottom); *Canal Elec. Co. v. United States*, 65 Fed.Cl. 650, 653-54 (2005).

That most of the cases involved the denial of permits, rather than the restoration of property to its prior state, does not render them inapposite-simply put, if the denial of a permit causing property to be unsuitable for a particular purpose does not effectuate a physical taking, but rather must be analyzed as a regulatory taking, then the same should be true where property is restored to the state it would have been in had a permit been denied. *See Broadwater Farms Joint Venture v. United States*, 35 Fed.Cl. 232, 242 (1996) (applying regulatory takings analysis in case where Corps "ordered plaintiff to stop work, then directed it to perform extensive restorative work that was inconsistent with the possibility of future development"), *vacated on other grounds*, 121 F.3d 727 (Fed.Cir.1997). If the restoration efforts are properly calibrated, the end result is the same in both instances. A contrary conclusion, of course, would suggest that property owners who violate the CWA should be treated better than those who comply with the law-a *non sequitur* if there ever was one. Accordingly, plaintiff should not be heard to argue that the reverse engineering of his property effectuated a physical taking.[39] Rather, the

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[39] Plaintiff attempts to analogize this case to *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed.Cir.1991), in which the Federal Circuit suggested that an EPA order providing for permanent access to testing well sites created an easement. Of course, here, the EPA officials were only allowed to monitor the completion of the restoration plan-access so limited that, if it were a taking, virtually any incursion by Federal officials to determine compliance with Federal law would require compensation. Such a construction of *Hendler* was squarely rejected by the Federal Circuit in *Boise Cascade*, 296 F.3d at 1355-56, a case that plaintiff does not cite. In that case, the court rejected the notion that allowing the government brief

appropriate analysis here is that of a regulatory taking and, as previously concluded, under that analysis plaintiff does not prevail.

2. Did the flooding of plaintiff's property effectuate a taking?

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intrusions onto the plaintiff's land to conduct surveys constituted a per se taking, stating-

> The government intrusion complained of in this case was of far lesser duration than that in *Hendler*, and it did not involve the placement of a permanent or even a quasi-permanent installation on Boise's property. In *Hendler*, the government entered the land and placed upon it what were essentially permanent wells-wells that it intended to actively monitor over the years. Here, in contrast, the Service briefly entered the land over a period of five months in order to conduct owl surveys needed for the resolution of a lawsuit initiated by Boise. The Service was not authorized to make, and did not make, any permanent incursion on Boise's land. Boise does not argue that the surveyors added any kind of permanent (or even temporary) addition to the landscape of the Walker Creek Unit. Boise nevertheless contends that the Service's intrusion satisfies the definition of "permanent" given in *Hendler*, and that the *Loretto* per se rule therefore applies.

Id. The Federal Circuit further indicated that, if read in the broad fashion plaintiff contends here, various dicta in *Hendler* was inconsistent with the Supreme Court's decision in *Loretto*. *Id.* at 1356; *see also Juliano v. Montgomery-Otsego-Schoharie Solid Waste Mgmt. Auth.*, 983 F.Supp. 319, 327 (N.D.N.Y.1997). Ultimately, the Federal Circuit concluded that it "is incorrect to suppose that *Hendler* compels us to turn a transient invasion by owl surveyors into a per se taking under *Loretto*." *Boise Cascade*, 296 F.3d at 1357.

Plaintiff, however, asserts that the restoration efforts here went too far-that the Consent Decree overreached and its enforcement has led to the outright flooding of land that was usable. As plaintiff points out, various cases have concluded that a government can effectuate a taking by causing property to be flooded. *See, e.g., United States v. Dickinson*, 331 U.S. 745, 751, 67 S.Ct. 1382, 91 L.Ed. 1789 (1946) (dam project resulted in taking of an "easement for intermittent flooding"); *United States v. Cress*, 243 U.S. 316, 318, 37 S.Ct. 380, 61 L.Ed. 746 (1917) (navigation improvements caused permanent condition in which plaintiff's land was overflowed by river); *United States v. Lynah*, 188 U.S. 445, 450, 23 S.Ct. 349, 47 L.Ed. 539 (1903) (flooding occasioned by dam left rice plantation an "irreclaimable bog"); *Pumpelly v, Green Bay Co.*, 13 Wall. 166, 80 U.S. 166, 167-68, 20 L.Ed. 557 (1871) ("where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution"); see also *Tuthill Ranch*, 381 F.3d at 1136 (discussing these and other flooding cases). But, these cases involve situations in which public works created artificial structures which caused flooding where no such conditions naturally existed. Such is not the case here-the alleged taking is instead predicated upon flooding that occurred as the consequence of reversionary engineering designed to place the property back to its natural state. *See* Sharon S. Tisher, "Everglades Restoration: Constitutional Takings Analysis," 10 J. Land Use & Envtl. L. 1, 8, 12 (1994) (recognizing a distinction

between actions that divert versus restore natural forces).

Rather than assisting plaintiff, the aforementioned flooding cases actually undercut his theory. First, they emphasize that to prove a physical takings, there must be evidence that the flooding of the Murphy Farm was proximately caused by the defendant. This requirement has been emphasized in cases where the property at issue had been flooded before the government undertook any action. Thus, for example, in *Sanguinetti v. United States*, 264 U.S. 146, 149-50, 44 S.Ct. 264, 68 L.Ed. 608 (1924), the Supreme Court held that no taking occurred where the plaintiff was unable to show that the overflow of his property was the "direct or necessary" of a levee constructed by the government. *See also Southern Pacific Co. v. United States*, 266 U.S. 586, 45 S.Ct. 124, 69 L.Ed. 454, (1924); *Bedford v. United States*, 192 U.S. 217, 225, 24 S.Ct. 238, 48 L.Ed. 414 (1904). Taking their lead from these cases, this court and the Court of Claims have denied recoveries in cases where the subject property was previously prone to natural flooding.[40] More recently, in *Ridge Line*, the Federal Circuit illuminated the

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[40] *See, e.g., Leeth v. United States*, 22 Cl.Ct. 467, 473, 485 (1991), *Laughlin v. United States*, 22 Cl.Ct. 85, 102 (1990); *see also Bartz v. United States*, 224 Ct.Cl. 583, 633 F.2d 571, 577 (1980), *cert. denied*, 450 U.S. 967, 101 S.Ct. 1484, 67 L.Ed.2d 616 (1981); *Ark-Mo Farms, Inc. v. United States*, 209 Ct.Cl. 116, 530 F.2d 1384, 1386 (1976); *Hartwig v. United States*, 202 Ct.Cl. 801, 485 F.2d 615, 620-21 (1973); Columbia *Basin Orchard v. United States*, 132 Ct.Cl. 445, 132 F.Supp. 707, 709 (1955); *Creech v. United States*, 102 Ct.Cl. 301, 60 F.Supp. 885, 896 (1944), *cert. denied*, 325 U.S. 870, 65 S.Ct. 1409, 89 L.Ed. 1989 (1945).

causation requirement underlying these cases, stating there that a "loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." 346 F.3d at 1355-56; *see also Loretto*, 458 U.S. at 427, 102 S.Ct. 3164; *Moden v. United States*, 404 F.3d 1335, 1342-43 (Fed.Cir.2005) (citing additional cases); *Banks v. United States*, 69 Fed.Cl. 206, 212 (2006). As described by this court in *Banks*, the Federal Circuit, in *Moden*, further explained that "the 'direct, natural, or probable result standard' articulated in *Ridge Line* requires not only proof of causation-that the government act was the likely cause of the injury-but also proof 'that the government should have predicted or foreseen the resulting injury'-that the injury was the likely result of the government act." *Banks*, 69 Fed.Cl. at 212 (quoting *Moden*, 404 F.3d at 1343); *see also Vaizburd v. United States*, 384 F.3d 1278, 1282-83 (Fed.Cir.2004). This court further noted that "[t]he Federal Circuit advised in *Moden* that 'injury may not be foreseeable if an intervening cause breaks the chain of causation.' " *Banks*, 69 Fed.Cl. at 212 (quoting *Moden*, 404 F.3d at 1344); *see also Avery v. United States*, 165 Ct.Cl. 357, 330 F.2d 640, 644-45 (1964).

In the case *sub judice*, the record plainly reveals that the purpose of the remediation plan was to restore the wetlands portion of the Murphy Farm to its state in 1985, prior to Mr. Brace's filling activities. Nothing in the record suggests that it was instead foreseen or foreseeable that implementation

of the plan would flood that property, so as to preclude it from being used as pastureland, as it had been used before. Indeed, in terms of causation, it has not been shown that the flooding is the result solely of the restoration, as there is evidence, including testimony and earlier deposition statements by Mr. Brace, that flooding of this property has occurred in the past, at times attributable to presence of beaver dams. At all events, it is uncontroverted that Mr. Brace never contacted the EPA, the Corps, any other Federal agency, or even the district court that entered the Consent Decree to complain that the effectuation of the restoration plan was causing his property to flood. While Mr. Brace testified that he did not make those contacts because he felt that they would prove unfruitful, the law suggests that he could not stand back, allow his property to be flooded, and then complain, after the fact, that government action that was intended to simply restore the wetlands had instead caused a taking. In the court's view, plaintiff's failure to prevent damage from accruing on his property represents an "intervening cause" that broke the chain of causation, thereby preventing this court from attributing the flooding on his property to the actions of government. Accordingly, no physical takings claim lies, at least as of this time, as the result of the flooding of plaintiff's property.[41]

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[41] At trial, various government officials indicated that they were prepared to work with Mr. Brace to remedy any unintended consequences of the restoration plan. The court will not speculate as to what legal action would be appropriate if these officials did not respond positively to an actual request.

Lastly, it bears noting that, as a factual matter, there is no proof that the area flooded exceeds that which previously was wetlands. While certain maps in the record indicate that there is now a pond where there was once vegetation, no proof was adduced as how the contours of the existing pond corresponds to the prior limits of the wetlands. Indeed, in his brief, plaintiff suggests only that the pond now exists on the land that previously was wetlands. Proof in this regard is so attenuated that, even if the court were to find that the creation of the pond effectuated a taking, there would be no basis, except conjecture, upon which to calculate damages. *See Applegate v. United States*, 35 Fed.Cl. 406, 417 (1996) ("Without an appropriate showing of the amount of beachfront allegedly lost, the court cannot rule as a matter of fact and law that any loss occurred-assuming that such allegations of loss are uncontroverted-and that any plaintiff in this case therefore is entitled to compensation for a taking of property.").

3. Did the Consent Decree create a conservation easement that effectuated a takings?

Finally, the court rejects plaintiff's assertion that defendant took from plaintiff's property a "conservation easement." In making this assertion, seemingly as an afterthought, plaintiff glosses over a number of issues, principal among them whether the *364 Consent Decree could be viewed as creating such an easement in favor of the United States. While plaintiff cites definitions of "conservation easement" from sources such as the Internal Revenue Code, it is beyond peradventure that, under

takings law principles, the question whether the decree created such an interest in the United States is initially a question of Pennsylvania state law.[42] Under that law, "conservation easements" are easements in gross-a personal right in the real estate of another that is not appurtenant to other land, but rather benefits a particular entity. *See* Ladner on Conveyancing in Pennsylvania, § 11.01 at p. 1 (Bisel, 4th ed.2006) (hereinafter "Ladner"). Such easements also are characterized as negative easements, also known as servitudes, because they authorize "the holder to object to a use of the servient tract by its owner inconsistent with the terms of the easement." *Ephrata Area School District v. County of Lancaster*, 886 A.2d 1169, 1174 (Pa.2005) (citing Restatement (Third) of Property, Servitudes § 1.2 (2000)(hereinafter "Restatement")).

Notably, conservation easements were not recognized under Pennsylvania common law because the equitable enforcement of a gross easements was prohibited. *See Ephrata*, 886 A.2d at 1175; *see also* Restatement, *supra*, at § 1.6, comment a. To remedy this, Pennsylvania, like 46 other states, *see id.* (statutory note), enacted a statute modeled on the Uniform Conservation Easement Act, 32 P.S. §§

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[42] *See MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 491-92 (5th Cir.), *cert. denied*, 537 U.S. 1046, 123 S.Ct. 623, 154 L.Ed.2d 519 (2002) (question whether "consent decree" could constitute a servitude was initially a question of Louisiana law); *see also Preseault v. United States*, 100 F.3d 1525, 1537 (Fed.Cir.1996).

5051-59.[43] That statute defines a "conservation easement" as-

> A nonpossessory interest of a holder in real property, whether appurtenant or in gross, imposing limitations or affirmative obligations, the purposes of which include, but are not limited to ... protecting, conserving or managing the use of natural resources; protecting wildlife, [and] maintaining or enhancing land, air or water quality....

Id. at § 5053. Such an easement, the statute further provides, "may be created, conveyed, recorded, assigned, released, modified, terminated or otherwise altered or affected in the same manner as other easements." *Id.* at § 5054(a).

Pennsylvania law consistently focuses on the intention of the parties as the main factor in determining whether an agreement created an express easement or servitude. *See Zettlemoyer v. Transcontinental Gas Pipeline Corp.*, 540 Pa. 337,

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[43] While this statute was not enacted until June 22, 2001, it applies to "any interest created before the effective date of this act when the interest would have been enforceable had it been created after the effective date of this act and has been recorded or, if not previously recorded, is recorded or otherwise placed of record within 180 days of the effective date of this act unless retroactive application contravenes the Constitution of the United States or laws of the Untied States or of this Commonwealth." 32 P.S. § 5057(b). Given the result reached below, the court need not address whether the retroactive application of the statute to the United States contravenes the Constitution.

657 A.2d 920, 926 (1995); *Lease v. Doll*, 485 Pa. 615, 403 A.2d 558, 561 (1979); *see also Restatement, supra*, at §§ 2.1, 2.17. Rules of contract interpretation are applied in discerning this intent, under which rules "[e]asements will be recognized only when the owner clearly intended to limit the rights of his or her estate." *Kapp v. Norfolk Southern Ry. Co.*, 350 F.Supp.2d 597, 607 (M.D.Pa.2004); *see also Haines v. Minnock Constr. Co.*, 289 Pa.Super. 209, 433 A.2d 30, 33 (1981) (citing *Yeakle v. Jacob*, 33 Pa. 376 (1859)); *Thomas v. Deliere*, 241 Pa.Super. 1, 359 A.2d 398, 399 (1976); *Ladner, supra*, § 11.02(a). And while no case in Pennsylvania has dealt with the issue, it is notable that cases applying these same rules of contract interpretation have repeatedly held that agreements do not create a servitude or an easement where they merely recognizes the preexisting rights of the parties. *See Crigger v. Florida Power Corp.*, 436 So.2d 937, 945 n. 16 (Fla.App.1983) ("An easement subtracts from the preexisting rights of the rightful owner of the servient estate."); *Plaquemines Parish Government v. Getty Oil Co.*, 662 So.2d 773, 777 (La.App. 1 Cir.1995) (no servitude created where *365 "compromise of litigation ... merely recognized those rights the parties claim to have"); 3 Richard R. Powell, Powell on Real Property § 34.10, at 34-111 (1994) ("an easement subtracts from the preexisting rights of the servient owner").[44] It would seem to

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[44] Applying a corollary to this rule, a variety of cases have held that the where an easement of necessity was created at the time property was transferred, compensation is not owed where that easement is later enforced by judicial decree. Summarizing these cases, one commentator has observed- "Since an easement of necessity is a right derived from the

follow, *a fortiori*, that a servitude or negative easement does not arise where an instrument merely recognizes the application of statutes that already apply of their own force to the property in question.

In arguing the existence of a conservation easement, plaintiff did not address any of these points. Certainly, nothing in the Consent Decree purports to create an easement or servitude and there is no basis to imply, via the other *res gestae* of the decree or otherwise, that either party believed that plaintiff was transferring such an interest to defendant. Rather, by its terms, the Consent Decree was designed to accomplish three main purposes: (i) to restore the property to its wetland state, *circa* 1985; (ii) to ensure that Mr. Brace would not commit further violations of the CWA; and (iii) to require plaintiff's payment of a civil penalty in the amount of $10,000. While the Consent Decree required plaintiff to record the decree in the applicable records office, it generally did not bind any of plaintiff's successors, stating only that-

> Until [the restoration of the property, the payment of the civil penalty and the recordation of the decree] have been performed and at least thirty days prior to any proposed transfer of any interest

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transaction-and exchange of consideration-by which the dominant and servient estates were originally severed, the judicial declaration of such an easement therefore amounts to a determination of preexisting rights, and does not constitute a new 'taking' of property or property rights for which payment of compensation would be constitutionally mandated." James Lockhart, 20 Causes of Action to Establish Easement of Necessity 395, § 25 (2005).

> in any part of the property affected by this Consent Decree, Defendants will provide a true copy of this Consent Decree to any proposed transferee and simultaneously will notify the United States of any proposed transfer. A transfer of interest in the said property will not relieve Defendants of any responsibility in this Consent Decree, unless the United States, Defendants, and the transferee agree to allow the transferee to assume such responsibility.

Thus, Mr. Brace would remain obligated under the Consent Decree whether he owned the property or not, absent the assumption of the decree's obligations by a subsequent purchaser. Indeed, the only portion of the decree that applied to successors or assigns was that permanently enjoining the discharge of any pollutants into the wetlands "unless such discharge is in compliance with the CWA." The latter provision, of course, did not make the CWA applicable to the property, as the statute applied of its own force-as Justinian once said, *non jus ex regula, sed regula ex jure*. Consequently, the court has little trouble concluding that neither this provision-nor any other aspect of the Consent Decree-created an easement or

a servitude, at least in the sense of those types of interests that might support a takings.[45]

Indeed, plaintiff has not cited a single case suggesting, let alone holding, otherwise. If the mere recognition of a property owners' obligations under the CWA gave rise to a servitude and, in turn, a physical taking, then virtually every regulation of a piece of property-certainly those effectuated through consent decrees and enforcement orders-would result in a takings. Such is not the law. None other than *Penn Central* itself dismissed, as "fallacy," the contention that "a 'taking' must be found to have occurred whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel." *Penn Central*, 438 U.S. at 130 n. 27, 98 S.Ct. 2646. Numerous other cases have

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[45] *See United States v. Colson*, 2005 WL 2086174 at *4 (S.D.Tex.2005) (judicial decree did not effectuate a taking where it merely declared a preexisting right); *MacCaskill v. Ebbert*, 112 Idaho 1115, 739 P.2d 414, 418 (1987) (where a judicial declaration amounts to a determination of preexisting rights, it does not constitute a new "taking" of property or property rights for which payment of compensation is constitutionally mandated); *see also Opinion of the Justices*, 139 N.H. 82, 649 A.2d 604, 609 (1994) ("Where private title to tidelands is already burdened by preexisting public rights, a regulation designed to protect those same rights will not constitute a taking of property without just compensation."); *see also Scott v. State of Oregon*, 23 Or.App. 99, 541 P.2d 516, 519 (1975) (use regulations imposed by state Scenic waterways Act was not easement for which compensation must be paid); *see generally*, Restatement, *supra*, at § 2.15, comment c. (regarding an implied servitude-"[t]his means that, prior to the conveyance, the property did enjoy such rights and that, absent the implied servitude, the conveyance would deprive it of such rights").

similarly refused to treat the application of statutes or regulations as giving rise to easements and physical takings, as well. *See Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-96, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) (rejecting the notion that the "mere enactment" of the Surface Mining and Control Reclamation Act effectuated a physical taking); *Stearns Co.*, 396 F.3d at 1357 (same); *Jentgen*, 657 F.2d at 1213 ("The [Supreme] Court has branded as fallacious the 'contention that a "taking" must be found to have occurred whenever the land-use restriction may be characterized as imposing a "servitude" on the claimant's parcel.' "); *Seiber v. United States*, 53 Fed.Cl. 570, 576-77 (2002), aff'd, 364 F.3d 1356 (Fed.Cir.2004), *cert. denied*, 543 U.S. 873, 125 S.Ct. 113, 160 L.Ed.2d 122 (2004) (imposition of logging restrictions on property did not, as a servitude, effectuate a physical taking); *Smith v. Town of Mendon*, 4 N.Y.3d 1, 789 N.Y.S.2d 696, 702-03, 822 N.E.2d 1214 (2004) (refusing to treat town conservation condition as a physical taking).[46]

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[46] Buttressing these rulings, the Supreme Court has at least twice emphasized the narrowness of its holdings in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 830-31, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), both of which, of course, involved situations in which the landowner effectively was deprived of the right to exclude others. *See City of Monterey*, 526 U.S. at 702, 119 S.Ct. 1624 ("we have not extended the rough proportionality test of Dolan beyond the special context of exactions-land use decisions conditioning approval of the development on the dedication of a public right"); *Lingle*, 544 U.S. at 546-47, 125 S.Ct. 2074 (citing *City of Monterey* approvingly on this point).

Plaintiff has offered nothing to distinguish these many authorities. Accordingly, his conservation easement argument suffers not only from a lack of factual development, but also from legal infirmities that seemingly are insurmountable. They are, at least, insurmountable here and, as such, warrant rejection of plaintiff's last ditch effort to demonstrate a physical taking in the case *sub judice*.

III. CONCLUSION

This court need go no further. Based on the foregoing, the court finds none of plaintiff's takings claims well-taken. As such, the Clerk is hereby ordered to enter judgment dismissing the complaint. No costs.

IT IS SO ORDERED.

s/ Francis M. Allgera
Francis M. Allegra
Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-3076

UNITED STATES OF AMERICA,

Appellant

v.

ROBERT BRACE;
ROBERT BRACE FARMS,

a Pennsylvania Corporation

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 90-cv-00229E)

Argued September 19, 1994

Before: BECKER and COWEN, Circuit Judges
and POLLAK*, District Judge

(Filed: November 22, 1994)

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OPINION OF THE COURT

COWEN, Circuit Judge.

The United States brought this action in the United States District Court for the Western District of Pennsylvania against Robert Brace, individually, and Robert Brace Farms, Inc., a Pennsylvania corporation (collectively, "Brace" or "defendants"), alleging violations of the requirement in Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, that a permit be obtained for the discharge of dredged or fill material into waters of the United States. The United States sought restoration of the site, a permanent injunction and civil penalties pursuant to 33 U.S.C. § 1319(d).

The district court bifurcated the action: a trial on liability issues and a trial on remedy issues. Shortly before the liability trial, Brace stipulated that at the time of the discharges, "the approximately thirty-acre site that is the subject of this lawsuit was wetlands as defined at 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2(r)." Pre-Trial Stipulation (Dec. 16, 1993); Appendix ("App.") at 40.

The United States, either by stipulation or at trial, established the five elements of a prima facie

case for violations of Section 404 of the CWA: (1) defendants admitted that they are "persons" within the meaning of the CWA; (2) defendants admitted that the activities at the site were conducted without a permit; (3) defendants stipulated that the site was a wetland at the time of the discharges; (4) the district court held that the site constituted waters of the United States at the time of defendants' activities; and (5) the district court held that defendant's clearing, mulching, churning, and leveling of the formerly wooded and vegetated site constituted a discharge of pollutants into the waters of the United States and that defendants paid for excavation and installation of drainage tubing in an effort to drain the site.

Brace asserted, and the district court held, that the discharges were exempt from the permit requirement under Section 404(f)(1). The court concluded that: (1) Brace's activities on the wetland constituted "normal farming activities" exempt under Section 404(f)(1)(A); and (2) Brace's activities constituted "upland soil and water conservation practices" also exempt under that same provision of the CWA. *United States v. Brace*, C.A. No. 90-229 (W.D. Pa. Dec. 16, 1993), slip op. at 22-23. In addition, the court found that Brace's conduct in "preserving and regularly cleaning the existing drainage system on the site" was exempt from the permit requirement as "maintenance of the drainage system" under Section 404(f)(1)(C). *Id.* at 23. The court also held that the recapture provision of Section 404(f)(2) does not apply to this case because "[t]he land is not being converted to a use to which it was not previously subject, nor has significant

impairment to the reach or flow of waters been proven." *Id.* at 22.

The district court entered judgment in defendants' favor. We hold that the district court incorrectly applied the requirements of the CWA permit exemption provisions. We will reverse the order of the district court and remand the case to determine the appropriate remedy.

I.

Brace is a farmer who owns approximately 600 acres of real property in Erie County, Pennsylvania, including the subject thirty-acre wetland site ("the site"). Brace Farms, Inc. is a Pennsylvania corporation engaged principally in the farming business. Brace's parents and other family members have always earned their principal livelihood from farming activities. Brace purchased a parcel of farm property from his father in 1975. A portion of that property contains the site. The property has been in the Brace family since the 1930's when Brace's grandfather farmed the land. Prior to 1975, Brace's father used the site for pasturing of cows and horses, and Brace's brother used the site for pasturing cows until 1976.

Brace purchased the property from his father with the intent of continuing and improving his father's established farming operation. It was Brace's intention to integrate the various portions of the property into an overall operation for an effective and productive farming business. At the time Brace purchased the property containing the site from his

father, the site was vegetated with areas of scrub brush, including red brush and briars.

In 1977, Brace sought the advice and assistance of the Agricultural Stabilization and Conservation Service ("ASCS") as part of his plan to develop an integrated farming operation on the property that includes the site. The ASCS is "an agency of the United States Department of Agriculture which is generally responsible for administering commodity production adjustment and certain conservation programs of the Department." 7 C.F.R. § 12.2(a)(2) (1994). Brace's father had previously worked with the ASCS to prepare a drainage plan relating to the site for the purpose of farming the entire property. At the time he purchased the property from his father, Brace obtained and utilized the soil and conservation plans that had been prepared for his father by the ASCS. The drainage system impacts the ability to produce crops on all parts of Brace's property.

The existing drainage system was in poor condition and not yet complete at the time of Brace's acquisition. Brace began cleaning the system in 1976 in order to improve upon the existing system and make it effective for agricultural development. In the following years, Brace maintained and improved the drainage system pursuant to the plan recommended by the ASCS. From 1977 to 1985 the ASCS periodically visited the site and provided technical assistance and cost-sharing arrangements to Brace.

As of 1977, the essential portions of Brace's improvements to the existing drainage system were

intact and operating. Brace's work in improving upon the interconnected drainage system progressed continuously from 1977 to 1987, as time, funds and equipment were available. If the necessary funds had been available to him in 1977, Brace would have expedited his farming plans and completed the project at that time. As a result of Brace's efforts, by the end of 1979 the site was dry, with the exception of times of excessive rainfall.

Brace cleared, mulched, churned, leveled, and drained the formerly wooded and vegetated site from 1985 through 1987. In 1986 and 1987, Brace paid for excavation in the site and the burying of plastic tubing or "drainage tile" in an effort to drain the site. Throughout the 1980's, Brace used appropriate equipment to remove unconsolidated soil, pebbles, silt, and growth which were impeding water flow. Farmers in the area typically engaged in such practices.

As a result of Brace's leveling, spreading, and tiling, Brace began to grow crops on the site in 1986 and 1987. Brace did not have a permit issued pursuant to Section 404 of the CWA authorizing his activities.

The United States became aware of Brace's activities in 1987. During 1987 and 1988, the United States issued three orders to Brace, directing him, inter alia, to refrain from further disturbing the site, so that it could naturally revegetate with indigenous plant species. After the issuance of these orders, Brace continued to mow vegetation on the site. In October of 1988, Brace received an administrative complaint in connection with his farming activities

on the site. Brace requested a hearing to contest the complaint, believing that his activities were exempt from any and all permit requirements. Prior to the hearing, the complaint was dismissed.

In the summer of 1988, Brace approached the ASCS in order to gain the status of "commenced conversion from wetlands" prior to December 23, 1985 with respect to the site. The ASCS was authorized to make such a determination under the Food Security Act of 1985, 16 U.S.C. §§ 3801, et seq. This Act contains a provision, referred to as the "Swampbuster," which denies certain Department of Agriculture benefits to farmers who produce an "agricultural commodity on converted wetland," unless such conversion commenced before December 23, 1985. 16 U.S.C. §§ 3821, 3822 (1988 & Supp. V 1993).

The ASCS granted the status to the site, finding that Brace's on-going farming activities had commenced prior to December of 1985, which would enable Brace to complete conversion and produce an agricultural commodity without losing USDA benefits. Letter from Erie County ASCS Office to Robert Brace (9/21/88); App. at 172. However, the ASCS expressly noted that "[t]he granting of a commencement . . . request does not remove other legal requirements that may be required under State or Federal water laws." USDA Form; App. at 173.

In April 1990, as a cautionary measure, Brace approached the Army Corps of Engineers ("COE") in an effort to obtain an after-the-fact permit to conduct his farming activities on the site, despite his belief that the activities were exempt from the permit

requirements of the CWA. The United States Environmental Protection Agency ("EPA") requested that the COE not review an application from Brace for an after-the-fact permit. Brace was advised that because the matter was then in litigation, the government would not act on his request for a permit. Since the time of the cease and desist orders Brace has terminated farming activity on the site except for routinely mowing the vegetation.

II.

The district court exercised its jurisdiction pursuant to 33 U.S.C. § 1319(b) (1988) and 28 U.S.C. §§ 1331, 1345, 1355 (1988 & Supp. V 1993). Our jurisdiction rests on 28 U.S.C. § 1291 (1988).

Presently, there are three issues before us. The first issue is whether the district court erred in determining that Brace's discharges of dredged and fill material into the wetland were exempt from the permit requirement pursuant to Section 404(f)(1) of the CWA, 33 U.S.C. § 1344(f)(1). The second issue is whether the district court erred in determining that Brace's discharges were not "recaptured" by the permit requirement under Section 404(f)(2) of the CWA, 33 U.S.C. § 1344(f)(2). We have plenary review over the question of whether the district court erroneously interpreted the meaning of the applicable statutes. *Moody v. Sec. Pac. Business Credit, Inc.*, 971 F.2d 1056, 1063 (3d Cir. 1992); *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 124 (3d Cir. 1991). To the extent that the court's ruling on these issues was also premised on findings of fact, we review any such findings under the clearly erroneous standard. *Zenith Radio Corp. v. Hazeltime Research,*

Inc., 395 U.S. 100, 108, 89 S. Ct. 1562, 1568 (1969); *Sheet Metal Workers Int'l Ass'n Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1278 (3d Cir. 1991).

The third issue is whether the district court erred in determining that Brace was not subject to liability for violations of administrative orders. Our review of questions of law such as this is plenary. *Moody*, 971 F.2d at 1063; *Manor Care*, 950 F.2d at 124.

III.

The Clean Water Act was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1988). Section 301(a) of the CWA prohibits the discharge of any pollutant into navigable waters of the United States, unless the discharge is authorized by a permit. 33 U.S.C. §§ 1311(a), 1362(12) (1988). We recognize that:

> The Act defines the operative terms of this prohibition broadly. The term "pollutants"includes fill material such as "dredged spoil, . . . rock, sand, [and] cellar dirt," 33 U.S.C. § 1362(6), and "navigable waters" means "the waters of the United States," *id.* § 1362(7). In so defining the term "navigable waters," Congress expressed a clear intent "to repudiate limits that had been placed on federal regulations by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters

> that would not be deemed 'navigable' under the classical understanding of the term."

United States v. Pozsgai, 999 F.2d 719, 724 (3d Cir. 1993), *cert. denied*, U.S. , 114 S. Ct. 1052 (1994) (citations omitted). The district court found that Brace's clearing, churning, mulching, leveling, grading, and landclearing of the formerly wooded and vegetated site was a discharge of a dredged spoil, biological material, rock and/or sand, each of which fits the definition of pollutant. *Brace*, slip op. at 18.

Section 404 of the CWA authorizes the Secretary of the Army, through the COE, to issue permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) (1988). *See also* 33 C.F.R. § 323.1 (1993). The permit program, as we recognized in *Pozsgai*, "is the central enforcement tool of the Clean Water Act . . . . Unpermitted discharge is the archetypical Clean Water Act violation, and subjects the discharger to strict liability." 999 F.2d at 724-25.

The COE and EPA have issued regulations defining the term "waters of the United States" to include "wetlands," among other bodies of water:

> (a) The term waters of the United States means
> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of

> the tide; . . .
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), . . . wetlands, . . . the use, degradation or destruction of which could effect interstate or foreign commerce . . .
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section . .
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. § 328.3(a) (1993); 40 C.F.R. § 230.3(s) (1993) (emphasis in original). The district court found that the site constituted waters of the United States at the time of Brace's activities. *Brace*, slip op. at 17. The term "wetlands" is defined as:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

33 C.F.R. § 328.3(b); 40 C.F.R. § 230.3(t). The parties have stipulated that the site constituted wetlands at the time of Brace's activities.

Exemptions to the general requirement for a Section 404 permit are contained in Section 404(f) of the CWA. Under Section 404(f)(1), a permit is not required for: (1) the discharge of dredged or fill material "from normal farming, silviculture, and ranching activities such a plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices," 33 U.S.C. § 1344(f)(1)(A); and (2) the discharge of dredged or fill material "for the purpose of . . . the maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(C).

The COE and EPA have promulgated regulations which provide that the "normal farming activities" exemption is available only to discharge activities that are "part of an established (i.e., on-going) farming . . . operation," and expressly stipulate that the exemption is *not* available either: (1) for "[a]ctivities which bring an area into farming . . . use"; or (2) where "modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. § 323.4(a)(1)(ii) (1993); 40 C.F.R. § 232.3(c)(1)(ii)(A), (B) (1993).

This provision further requires that, to be exempt from the permit requirement, such activities "must be in accordance with definitions in 33 C.F.R. § 323.4(a)(1)(iii)." 33 C.F.R. § 323.4(a)(1)(ii). The definitions in 33 C.F.R. § 323.4(a)(1)(iii) provide that "the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing." 33 C.F.R. § 323.4(a)(1)(iii)(D); 40 C.F.R. § 232.3(d)(4). The definitions also define "minor drainage" as meaning "[t]he discharge of dredged or

fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands." 33 C.F.R. § 323.4(a)(1)(C)(1)(i); 40 C.F.R. § 232.3(d)(3)(i)(A). This latter definition is modified by 33 C.F.R. § 323.4(a)(1)(iii)(C)(2) and 40 C.F.R. § 232.3(d)(3)(ii), which further provide that the term minor drainage "does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland . . . , or conversion from one wetland use to another."

The COE has also promulgated definitions concerning the second exemption to the permit requirement, i.e. the exemption for the maintenance of drainage ditches. The definitions provide that the exemption from the permit requirement applies to "maintenance (but not construction) of drainage ditches." 33 C.F.R. § 323.4(a)(3).

Even where Section 404(f)(1) exempts a discharge from the permit requirement, the discharge may be "recaptured" by the permit requirement under Section 404(f)(2):

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section. 33 U.S.C. § 1344(f)(2). The regulation governing the "recapture" provision stipulates in part that "[a] conversion of a section

404 wetland to a non-wetland is a change in use of an area of waters of the United States," 33 C.F.R. § 323.4(c), and states as an example, that "a permit will be required for the conversion of a cypress swamp to some other use . . . when there is a discharge of dredged or fill material into waters of the United Stated in conjunction with construction of . . . structures used to effect such conversion." *Id.*

Thus, to be exempt from the CWA permit requirement, a defendant has the burden of demonstrating that proposed activities both *satisfy* the requirements of Section 404(f)(1) and avoid the recapture provision of Section 404(f)(2). *United States v. Akers*, 785 F.2d 814, 819 (9th Cir.), *cert. denied*, 479 U.S. 828, 107 S. Ct. 107 (1986). *See also United States v. Cumberland Farms*, 647 F. Supp. 1166, 1176 (D. Mass. 1986) ("[E]ven if [defendant] could establish that it is exempt from the permit requirements under § 1344(f)(1), it must also demonstrate that its activities avoid `recapture' under the provisions of 33 U.S.C. § 1344(f)(2)."), aff'd, 826 F.2d 1151 (1st Cir. 1987), *cert. denied*, 484 U.S. 1061, 108 S. Ct. 1016 (1988). Read together, the two parts of Section 404(f) provide a narrow exemption for agricultural activities that have little or no adverse effect on the waters of the United States. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 926 (5th Cir. 1983). Congress intended this narrow exemption. As Senator Muskie, one of the primary sponsors of the CWA, explained:

> New subsection 404(f) provides that Federal permits will not be required for those narrowly defined activities that cause little or no adverse effects either

> individually or cumulatively. While it is understood that some of these activities may necessarily result in incidental filling and minor harm to aquatic resources, the exemptions do not apply to discharges that convert extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.

3 *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act*, at 474 (1978).

IV.

The district court held that Brace's activities on the thirty-acre wetland site were exempt from Section 404's permit requirement "because they constitute: (a) normal farming activities; (b) upland soil and water conservation practices; and (c) maintenance of drainage ditches." *Brace,* slip op. at 22. We find that the district court's determination is erroneous as a matter of law.

The district court's conclusion that Brace's discharges on the thirty-acre site constituted "normal farming activities" which are exempt from Section 404's permit requirement cannot be reconciled with the statute, the applicable regulations, and case law governing the "normal farming activities" exemption. As we described above, Section 404(f) of the CWA provides exemptions to the general permit requirement, including the discharge of dredged or fill material without a permit in connection with "normal farming . . . activities such as plowing,

seeding, cultivating, minor drainage, harvesting . . . or upland soil and water conservation practices." 33 U.S.C. § 1344(f)(1)(A). In determining that Brace's activities fell within this provision, the district court relied on facts that are irrelevant to the inquiry required by the applicable law. The district court appears to have based its conclusion on a casual observation that what Brace did was "normal" activity for a farmer in Erie County, rather than on the application of the regulatory construction accorded the statutory term "normal farming activities" by the agencies charged with the implementation of the statute.[1]

The applicable regulation provides that, to constitute "normal farming activity" within the meaning of the statute, the activity:

> must be part of an established (i.e., on-going) farming . . . operation and must be in accordance with the definitions in § 323.4(a)(1)(iii) . . . . Activities which bring an area into farming . . . use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

33 C.F.R. § 323.4(a)(1)(ii). Brace's activities between 1985 and 1987 meet neither prong of this provision:

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[1] See 33 U.S.C. §§ 1251(d) and 1344 for the implementation authority of the EPA and COE.

they were neither part of an "established (i.e., on-going) farming operation," nor were they conducted "in accordance with the definitions in § 323.4(a)(1)(iii)."

A.

Brace points out that in determining whether farming activities are established and continuing, the conduct must be analyzed by a contextual review of the total activities. *Cumberland Farms*, 647 F. Supp. at 1175. He argues that the district court correctly undertook a contextual analysis in its determination that the site was an integral part of an established and on-going farm operation, and Brace's activities between 1985 and 1987 did not bring a new area into the operation. *Brace*, slip op. at 12. The district court based its conclusion on: (1) its determination that the site is an integral part of the drainage system previously installed in adjoining crop producing fields; (2) its finding that the installation of a drainage system at the site "is normal farming activity in order to make land suitable for farming," because "[e]xtensive underground drainage systems are typical and necessary aspects of farming in Erie County," *id.* at 3; and (3) the ASCS determination that Brace had "commenced conversion" of the site from wetland to cropland prior to December 23, 1985.

The district court's reasoning and conclusion are improper. The district court misinterpreted the meaning of the "established farming operation" requirement. The district court believed it was appropriate to examine the relationship of the site in question to the rest of the land owned by the same

property-owner in determining whether land was being brought into farming use. Brace maintains that it is arbitrary to delineate artificially a portion of the farm and without rational justification sever it from his overall operations. We cannot agree with this interpretation of the statute's requirement.

The regulations provide that, "[a]ctivities which bring an *area* into farming . . . use are not part of an established operation." 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(B) (emphasis added). The regulations do not specify the precise area to which we should look in determining whether there is an established farming operation. There are no minimum limits placed on the "area" being brought into farming use. Thus, we read the regulations to provide that an exemption is available only to activities that are part of an "established farming operation" *at the site*. A proper "contextual review of its total activities" only requires us to analyze whether such activities are "established and continuing" on the thirty- acre wetland site itself. *See Cumberland Farms*, 647 F. Supp. at 1175 (referring to "the site," rather than the property owner's total land holdings).[2] Our reading of the regulation recognizes the statute's legislative history and is in accord with the strict construction of the

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[2] We recognize that the designation of the use of some very small sites will be effectively inseparable from the use of the surrounding land for established farming operations. Thus, we would not require that every square foot be used for farming in order for a site to meet the established operation exemption. In this case, however, it is clearly reasonable to require that all or substantially all of the thirty-acre site be part of an established operation.

permit exemptions afforded by other Courts of Appeals. *See, e.g., Akers*, 785 F.2d at 819, 823; *United States v. Huebner*, 752 F.2d 1235, 1240-41 (7th Cir.), *cert. denied*, 474 U.S. 817, 106 S. Ct. 62 (1985); *Marsh*, 715 F.2d at 925 n.44.

Brace himself testified that: (1) for the nine-year period prior to the discharges onto the site, from 1977 to 1986, his activities at the site included no pasturing or growing of any crops, but consisted entirely of efforts to drain the wetland; (2) the site was fully covered in 1983 with indigenous plants, but that all plants had been stripped from the site in 1987, subsequent to the discharge activities; and (3) the purpose of his 1985-1987 discharges was to drain the wetland and make it suitable for row cropping. The district court found that "*[a]s a result of* Defendants' leveling, spreading and tiling, Defendants began to grow crops on the site in 1986 and 1987." *Brace*, slip op. at 9 (emphasis added). These facts do not justify the district court's determination that Brace's activities on the site were exempt from the permit requirements as "normal farming activities." Indeed, the factual findings of the district court can only lead to the opposite conclusion. Brace converted a thirty-acre site that was not suitable for farming into a site that is suitable for farming, and thus "brought an area into farming use."

Even if Brace's father's pre-1975 use of the site for pasturing could be considered to have been a prior, "established farming operation" on the site, Brace's drainage activities demonstrate that the court erred as a matter of law in finding the exemption from the permit requirement available for

his subsequent activities. Under the regulations, a farming operation is *not* "ongoing" where "modifications to the hydrological regime are necessary to resume operations." 33 C.F.R. § 323.4(a)(1)(ii); 40 C.F.R. § 232.3(c)(1)(ii)(B). Here, Brace admitted that "modifications to the hydrological regime," i.e., drainage of the site through excavating and burying four miles of plastic tubing for drainage, were necessary to grow crops on the site.

Our determination is consistent with the holdings of numerous other courts that have found the "normal farming" exemption inapplicable because modifications were required to resume farming. *See, e.g., Akers*, 785 F.2d at 819-20 ("[Defendant] argued below that unless he were allowed to complete the work he had started, the effect of which is to drain the wetland, he would be unable to engage in the farming activities he had planned. By his own admission, his activities require substantial hydrological alteration to [the site], and run afoul of the regulations."); *Bayou Marcus Livestock & Agric. Co. v. EPA*, No. 88-30275, 20 Envtl. L. Rev. (Envtl. L. Inst.) 20445, 20446 (N.D. Fla. Nov. 3, 1989) ("Before plaintiffs could have effectively harvested the timber and begun farming, it was necessary to dredge, fill, construct roads and dig ditches . . . . [I]f an ongoing operation had been previously functioning, such changes in the landscape would have been unnecessary."); *United States v. Larkins*, 657 F. Supp. 76, 85-86 n.23 (W.D. Ky. 1987) ("Activities cease to be established when the property on which they were once conducted `. . . *has lain idle so long that modifications to the*

hydrological regime are necessary to resume operations.' Reducing the reach of the [site] required modifications of the site's hydrological regime. Consequently, even if the wetland had a history of farm use, that use was no longer established at the time [of defendant's activities]." (emphasis by court) (citations omitted)), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016, 109 S. Ct. 1131 (1989).

Brace suggests that this line of cases is distinguishable from his circumstances because of, *inter alia*, the larger size of the farms and wetlands at issue in those cases, and the fact that one site was a habitat for an endangered species. We cannot agree. There is no provision in Section 404(f)(1) of the CWA or its implementing regulations under which either the size of a wetland or the effect of discharge activities on wildlife are factors relevant to determining whether particular discharge activities are exempt from the permit requirement. Although wetland protection in Section 404 serves the important function of protecting wildlife habitats, in addition to several other functions including flood and erosion control and water purification, *see* 33 C.F.R. § 320.4(b)(2), neither the statute nor the regulations condition the permit requirement on the existence of adverse impacts on wildlife or on the particular size of a wetland. Indeed, we have upheld determinations of both civil and criminal liability for the discharge of fill material onto a 14-acre wetland site, a substantially smaller site than Brace's, where there was no claim of adverse impact on wildlife. *United States v. Pozsgai*, 999 F.2d 719 (3d Cir. 1993), *cert. denied*, U.S. , 114 S. Ct. 1052 (1994) (civil), and

United States v. Pozsgai, 897 F.2d 524 (3d Cir.), *cert. denied*, 498 U.S. 812, 111 S. Ct. 48 (1990) (criminal).

In addition to the district court's erroneous interpretation of the "established farming operation" requirement, the district court erred as a matter of law in finding that Brace's installation of a drainage system at the site "is a normal farming activity in order to make land suitable for farming," because "[e]xtensive underground drainage systems are typical and necessary aspects of farming in Erie County." *Brace*, slip op. at 3. Brace argues that the court correctly considered the area-specific context in its fact finding inquiry. However, this factual determination is a legal conclusion, and is not merely a matter for factual findings. The question is not whether farmers in a particular county install extensive drainage systems. Rather, the proper question is whether the activities performed by Brace at this particular site, and at a time when the CWA applied, were within the meaning of the statutory term "normal farming activities" as defined by the regulations. Regardless of how "typical" or "necessary" such drainage systems may be in Erie County, Section 404 of the CWA requires a permit for "activities which bring an area into farming . . . use," as opposed to activities that are part of an "established farming operation." Brace did not have an "established farming operation" on the site prior to his discharges, and brought the site into farming use by discharging pollutants into waters of the United States.

Moreover, the district court erred in relying upon a determination from the ASCS in September of 1988 that Brace had "commenced conversion" of

his property from wetland to cropland prior to December 23, 1985, as evidence of an "established farming operation" at the site. The USDA Swampbuster Commenced and Third-Party Determinations form signed by Brace expressly states that "[t]he granting of a commencement . . . does not remove other legal requirements that may be required under State or Federal water laws." USDA Form; App. at 173. The purpose of the "commenced conversion" determination is solely to prevent the loss of USDA benefits. The ASCS determination is not a dispositive factor in our analysis.

Moreover, to the extent that the ASCS determination has any relevance to our analysis of "normal farming activities," it undermines such a conclusion. The very title of the determination -- "commenced conversion" -- indicates that Brace's discharge activities were not part of an ongoing farming operation, but rather, were directed at *converting* the wetland to the farming operation of growing crops. Even if the ASCS determination had stated that a conversion had been *completed* by December 23, 1985, the CWA permit requirement would not have been affected. Brace's activities were unpermitted and unauthorized when they occurred, and the "commenced conversion" determination provides no basis for an after-the-fact legitimization of those activities.

B.

As we explained above, the regulation governing the "normal farming activities" exemption has a second prong, under which drainage activities,

in addition to being a part of an "established farming operation" as defined by the regulation, must be "in accordance with definitions in § 323.4(a)(1)(iii)." 33 C.F.R. § 323.4(a)(1)(ii). Brace's activities failed to meet the requirements of this second prong in addition to not being a part of an ongoing, established farming operation. Brace's undisputed activities: (1) excavating soil and discharging in connection with burying approximately four miles of plastic tubing for drainage; (2) leveling and clearing the formerly wooded and vegetated site; and (3) spreading dredged material, are all excluded from the activities allowed under 33 C.F.R. § 323.4(a)(1)(iii).

Brace's installation of four miles of tubing which drains the site is barred by the provision's express prohibition of both: (1) "the construction of any . . . structure which drains or otherwise significantly modifies . . . a wetland or aquatic area constituting waters of the United States"; and (2) "drainage associated with the immediate or gradual conversion of a wetland to a non-wetland . . ., or conversion from one wetland use to another." 33 C.F.R. § 323.4(a)(1)(iii)(C)(2). *See also* 40 C.F.R. § 232.3(d)(3)(D)(ii). Brace's clearing of all vegetation from the wetland site, and his spreading of dredged materials onto the site, are barred by the provision's express prohibition of both: (1) "the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland"; and (2) "the redistribution of surface materials by blading, grading, or other means to fill in wetland areas." 33 C.F.R. § 323.4(a)(1)(iii)(D). *See also* 40 C.F.R. § 232.3(d)(4).

Accordingly, by definition, Brace's discharge activities cannot constitute "normal farming activities" under the applicable regulation.

We are unpersuaded by Brace's assertion that we need not reach the definitions of 33 C.F.R. § 323.4(a)(1)(iii) because there was no conversion from one wetland use to another. Brace bases his argument on the district court's determination that Brace simply *maintained* and improved his drainage system, and continued, piece by piece, to farm land which, in one form or another, had always been used for crops or pasture. Brace asserts that spreading materials that he dredged from ditches on the site onto other portions of the site was an ordinary and normal maintenance procedure employed by local farmers. Under the CWA, a permit is not required for the discharge of dredged or fill material for the purpose of maintaining drainage ditches. 33 U.S.C. § 1344(f)(1)(C). Thus, Brace argues and the district court agreed that Brace's activities constituted maintenance of drainage ditches, an activity clearly exempt from the permit requirements of the CWA.

The exemption from the permit requirements under Section 404(f)(1)(C) for "maintenance of drainage ditches" applies to "any discharge of dredged or fill material that may result from . . . the *maintenance (but not construction)* of drainage ditches." 33 C.F.R. § 323.4(a)(3) (emphasis added). We find the district court erred as a matter of law in finding that Brace was simply maintaining rather than constructing the drainage ditches. Likewise, the conclusion of the district court that the activities of Brace do not require a permit because they constitute maintenance of drainage ditches, *Brace*,

slip op. at 22, is not supported by the evidence. Brace caused the excavation of the site and the burying of several miles of plastic tubing to facilitate drainage. It is not realistic to describe what Brace was doing as "continuing maintenance." Brace's construction of a drainage system absent a permit was expressly prohibited by the regulation absent a permit. *See Huebner*, 752 F.2d at 1242 (defendants' cleaning and deepening existing ditches, excavating a new ditch, and discharging dredged materials required a permit when it brought an area of navigable waters into a use to which it was not previously subject).

Moreover, any activity that could be described as maintenance of drainage ditches was accomplished, if at all, by dredging ditches at the site. Brace's subsequent leveling at the site and spreading of the dredged material were separate, independent activities that are not subject to an exemption from the permit requirement. This subsequent spreading of dredged materials onto other portions of the site served no purpose beyond converting the thirty-acre wetland site to an upland site that could accommodate the growing of crops; it did not "result" from the maintenance of drainage ditches. There is no statutory or regulatory provision under which the spreading of the dredged materials is permissible absent a permit. The district court erred as a matter of law in holding Brace's activities permissible.

V.

As we discussed above, Brace has the burden of proving both that he qualifies under Section

404(f)(1) for the normal farming activities exemption, and that the permit requirement was not "recaptured" under Section 404(f)(2) of the CWA, 33 U.S.C. § 1344(f)(2). The "recapture" provision stipulates that:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section. 33 U.S.C. § 1344(f)(2).

The applicable regulation provides that "[a] conversion of a section 404 wetland to a non-wetland is a change in use of an area of the waters of the United States." 33 C.F.R. § 323.4(c).

Initially, the district court incorrectly stated that the application of the recapture provision required the United States to establish the two elements:

> First, it must be established that Brace's activities were conducted in order to bring the property into a use to which it was not previously subject. Second, if this element is established, it must then be established that Brace's activities will impair the flow or circulation of navigable waters or will reduce the reach of such waters. *Brace*, slip op. at 21.

The court's articulation of the legal standard implies that the burden of demonstrating "recapture" is on the United States. This legal standard is erroneous.

Since we have held that Brace's drainage activities on the thirty-acre wetland site are not exempt from the CWA permit requirement under the "normal farming activities" or maintenance of drainage ditches exemptions, we need not reach the application of the recapture provision. We note, however, that the district court's conclusion that the recapture provision does not apply because "[t]he land is not being converted to a use to which it was not previously subject, nor has significant impairment to the reach or flow of waters been proven," *Brace*, slip op. at 22, is incorrect as a matter of law. The evidence establishes that Brace's activities drained the site to convert it from a wetland to a new, non-wetland use: the district court found that the site was inundated with water at various times in the past; the parties stipulated, and the court found, that the site constituted a wetland at the time of the discharges; Brace admitted that the purpose of installing the four miles of plastic tubing at the site in 1986 and 1987, and of clearing the vegetation from the site between 1985 and 1987, was to drain the site and make the ground ready for growing crops; and the court found that as a result of Brace's leveling, spreading and tiling, he began to grow crops on the site in 1986 and 1987. Thus, Brace's activities fall squarely within the statutory definition of "recapture."

VI.

The last issue that we must address is that of Brace's penalty for violations of the permit requirements of Section 404 of the CWA and for his violations of the EPA administrative orders. Clearly, under the CWA Section 309(d), Brace is subject to a

civil penalty for his violation of the CWA permit requirements. 33 U.S.C. § 1319(d) (1988).[3] Upon remand the district court must determine the appropriate amount of the penalty, based on the statutory factors delineated in Section 309(d). The more difficult issue is whether Brace is also subject to civil penalties for his noncompliance with the EPA administrative orders. The district court found both that: (1) the EPA's administrative order had required Brace "to cease and desist all activities on the site," *Brace*, slip op. at 14; and (2) "Defendants failed to totally comply with Administrative Orders issued to them." *Brace*, slip op. at 14. However, the district court did not attach liability for violating the orders, based on its findings that "Defendants have not disturbed the soil on the site in any significant way since being served with the cease and desist orders,

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[3] Section 1319(d) provides in pertinent part:

> Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section . . . 1344 of this title by a State, . . . and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

and in the view of this Court acted only out of sincere conviction, although undoubtedly misguided." *Id.*

Section 309(d) provides that "any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty." 33 U.S.C. § 1319(d). Section 309(d) does not afford the district court discretion to grant an exemption from liability for violating the EPA administrative orders. *See, e.g., Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990) (the language of Section 309(d) "makes clear that once a violation has been established, some form of penalty is required.") However, the record is not sufficiently clear for us to determine whether civil penalties are mandatory under the circumstances of this case. We remand this issue to the district court for further review of Brace's non-compliance with the EPA administrative orders. Thereafter, the district court must determine what, if any, civil penalties should be assessed against Brace for his violations of the EPA administrative orders.

VII. CONCLUSION

For the foregoing reasons, the order entered December 17, 1993, granting judgment in favor of the defendants, Robert Brace and Robert Brace Farms, Inc., will be reversed. This matter will be remanded to the district court to enter judgment in favor of the United States and to assess upon further proceedings appropriate penalties for defendants' violations of the permit requirements, and to assess what, if any, penalties are appropriate for violations of the EPA administrative orders.

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